

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

GARY WASHINGTON,

Plaintiff

v.

BALTIMORE POLICE DEPARTMENT, *et al.*,

Defendants

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Case No. 1:19-cv-02473-GLR

Judge Stephanie Gallagher

**JURY TRIAL DEMANDED**

**EXHIBIT C**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
SOUTHERN DIVISION

GARRETH PARKS, Civil No. TDC-18-03092

Plaintiff,

v. Greenbelt, Maryland

BALTIMORE POLICE DEPARTMENT, September 6, 2019  
et al.,

Defendants. 9:30 a.m.

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TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE THEODORE D. CHUANG  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Loevy & Loevy  
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Proceedings recorded by mechanical stenography,  
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P R O C E E D I N G S

THE CLERK: The matter now pending before this Court is Civil Number TDC-18-3092, Parks versus Baltimore Police Department, et al. We're here today for a motions hearing. Counsel, please identify yourself for the record.

MS. HORN: Your Honor, Gayle Horn, H-O-R-N, on behalf of the plaintiff, Mr. Parks.

THE COURT: Good morning.

MS. SPENCE: Good morning. Renee Spence on behalf of the plaintiff, Mr. Parks.

MS. ROCHE: Good morning, Your Honor. Katie Roche on behalf of the plaintiff, Garreth Parks.

THE COURT: Good morning.

MR. DAHL: Good morning, Your Honor. Christopher Dahl, Baker Donelson. I am joined by Neil Duke, who is seated behind me. Together, we represent 16 of the individual defendants, Blane Vucci, Gordon Carew, Joseph Mueller, Kimberly Parks, Todd Tugya, Paul Dean --

(The court reporter asked Mr. Dahl to slow down.)

MR. DAHL: Sure. Blane Vucci, Gordon Carew --

THE COURT: Can I just ask that counsel stand when they address the Court, please?

MR. DAHL: Sure. Blane Vucci, Gordon Carew,

1 Joseph Mueller, Kimberly Parks, Todd Tugya, Paul Dean,  
2 Jennifer Grant, personal representative of the estate of  
3 Barry Grant, Joseph Jefferson, Brian Horton, Tom Pfeiler,  
4 Brian Ford, Kevin Buie, John Riddick, Joseph Phelps, Ray  
5 Laslett and Donald Watson.

6 THE COURT: Okay. Good morning. And the other  
7 counsel -- just for the record, do I have all the names of  
8 counsel on the record or not?

9 MS. LYNCH: I believe so, Your Honor. I'm Kara  
10 Lynch on behalf of the Baltimore Police Department.

11 THE COURT: Okay.

12 MR. NATHAN: My name is Shneur Nathan. I  
13 represent the same individual defendants that Mr. Dahl  
14 mentioned and also the estate of Mr. Hagee.

15 THE COURT: Okay. So we're here for a motion --  
16 a hearing on the motion to dismiss -- motions to dismiss.  
17 I think there's a number of issues here. We do have  
18 arguments on behalf of the individual defendants. We also  
19 have the argument by the department.

20 I also have this letter regarding another  
21 proposed motion and we may be able to discuss this at the  
22 end of the hearing. But given how far we have moved  
23 through the issues -- at least I have moved through the  
24 issues on the motion, I plan to address these issues  
25 separately. I think there's no reason why we couldn't

1 even rule on the motions that are pending without  
2 prejudicing any argument that might be made in this  
3 separate letter. So we'll take these things one at a  
4 time.

5 We'll start with the motions. I have some  
6 questions for the parties. But I know that you may have  
7 other things you want to offer. So I'll ask the moving  
8 parties, in this case the defendants to go first, give the  
9 plaintiffs roughly equal time and then some very brief  
10 opportunity for rebuttal.

11 I would ask since there is multiple issues that  
12 when I say equal time, that collectively all the issues  
13 for the defendants collectively would be both sides would  
14 have equal time.

15 And so notionally, I am thinking about 20  
16 minutes a side. Don't know how you want to divide that or  
17 if you want to divide that. If I go over because I have  
18 additional questions, then obviously, I'll try to give the  
19 other side equal time as well. So who would like to go  
20 first?

21 MR. DAHL: Your Honor, for the record,  
22 Christopher Dahl. I'll go first for the moving individual  
23 defendants.

24 THE COURT: Okay. And so I take it then that  
25 you're prepared to talk about the issues in that motion.

1 But if I have questions about the Monell claim or this  
2 issue about the Eleventh Amendment, I should save that for  
3 who?

4 MS. LYNCH: Kara Lynch, Your Honor --

5 THE COURT: Okay.

6 MS. LYNCH: -- from the Baltimore Police  
7 Department.

8 THE COURT: Okay. Great. So go ahead, Mr.  
9 Dahl.

10 MR. DAHL: Thank you, Your Honor. As I stated  
11 earlier, I represent 16 of the current retired and in one  
12 case, deceased officer of the Baltimore Police Department,  
13 who are among those collectively referred to as the  
14 individual defendants in the complaint.

15 This action as the Court is aware arises from a  
16 homicide and nonfatal shooting on July 16, 1999 for which  
17 the plaintiff was convicted. Sixteen years later, he was  
18 granted a new trial and eventually, the charges were  
19 dismissed and subsequently, the plaintiff has brought suit  
20 against apparently every officer known to be at the scene  
21 or otherwise involved in the investigation and has done so  
22 on three theories.

23 The first and primary theory is the existence or  
24 the discovery of the so-called Mueller report, which is a  
25 document that we have attached as part of the Plaintiff's

1 Petition for Writ of Actual Innocence at ECF 51-2,  
2 specifically page 27, secondly, a two-sentence allegation  
3 that one or more of the officers buried the gun or guns  
4 used in the crime and third, a collective allegation of  
5 witness intimidation of the several witnesses identifying  
6 Mr. Parks as the shooter in this crime.

7 We need to dismiss for several reasons, but the  
8 principal one which I'll move to first is judicial  
9 estoppel as to the Mueller report and failure to plead  
10 with the requisite level of plausibility as to the balance  
11 of the plaintiff's claims.

12 THE COURT: So on judicial estoppel, one of the  
13 requirements is bad faith.

14 MR. DAHL: Yes, Your Honor.

15 THE COURT: And, first off, what in the  
16 complaint indicates there's bad faith and/or how is that  
17 established at the motion to dismiss stage?

18 MR. DAHL: It's established at a motion to  
19 dismiss stage through the use of judicial notice of the  
20 Mueller report and of the plaintiff's characterization of  
21 the Mueller report in the Plaintiff's Petition For Writ of  
22 Actual Innocence before the Circuit Court for Baltimore  
23 City. It is a material difference in the world of Brady,  
24 particularly, the world of Section 1983 Brady-based claims  
25 who withheld the document. If the document is withheld by



1 a police officer, then the police officer is personally  
2 liable for any incarceration under a theory of malicious  
3 prosecution. If it's withheld instead by the prosecutor,  
4 well, then the prosecutor had it, the police officer's job  
5 is done. And that was -- been recently set forth by the  
6 Fourth Circuit in the Owens case. And at the time of this  
7 crime notably had been recently set forth as a matter of  
8 absolute immunity by the Fourth Circuit in Jean v.  
9 Collins. That was subsequently vacated and then  
10 reinstated as a softer concurrence. But that was the law  
11 at the time and it remains the law today.

12 The plaintiff was quite clear when he was the  
13 criminal defendant seeking release that the Mueller report  
14 assuming authenticity says what it means. There's a note  
15 at the bottom reading "per Ms. Costley, this report is not  
16 to be released; please contact State's Attorney at  
17 410-545-6433." And the plaintiff went above and beyond in  
18 order to paint Ms. Costley as a --

19 THE COURT: Well, factually speaking, if it had  
20 been the officers or if the officers had been colluding or  
21 involved in this alleged withholding, wouldn't that also  
22 have provided a basis for the conviction to be vacated?

23 MR. DAHL: Collusion would not under these  
24 circumstances, Your Honor. I would disagree respectfully  
25 for two reasons.

1 First and foremost, it's not what the plaintiff  
2 pleaded. The plaintiff did not plead a collusion case  
3 where the prosecutor was in on it and the police officers  
4 participated in that. But secondly, under the more recent  
5 opinion of Evans v. Chalmers, the Fourth Circuit has made  
6 it very clear that the independent acts of a prosecutor,  
7 even if the police were in on that act, act to cut off  
8 liability under Section 1983 is a matter of but for and  
9 proximate causation. Quite plainly, unless it has been  
10 pleaded, which it has not, that the officers misled the  
11 prosecutor or unduly pressured the prosecutor, the actions  
12 of the prosecutor from which the plaintiff is judicially  
13 estopped from pleading the contrary --

14 THE COURT: I guess the question I have is if  
15 the argument on the petition, the innocence petition had  
16 centered around the officers, wasn't there still a viable  
17 way to convince the Court to vacate the conviction? This  
18 isn't a situation where having officers who are  
19 withholding a report or is somehow engaged in improper  
20 conduct would have been entirely detrimental to his claim,  
21 would it? I mean if there are officers who are bearing  
22 these reports as you said, isn't there still a path to get  
23 your conviction vacated?

24 I guess I'm asking whether it really is that the  
25 plaintiff was acting in bad faith when whoever was

1 potentially at fault for this, he still had an argument to  
2 make.

3 MR. DAHL: Your Honor, to be quite clear, it's  
4 not necessarily our position that the plaintiff was acting  
5 in bad faith before the Circuit Court for Baltimore City.  
6 Our position --

7 THE COURT: Isn't that what you need for  
8 judicial estoppel?

9 MR. DAHL: It is not. The plaintiff is acting  
10 in bad faith today by pleading contrarily to his positions  
11 taken in the circuit court case. And my authority for  
12 that is Lowery v. Stovall. That's what the Fourth Circuit  
13 found in its central case. Not that the plaintiff had  
14 misled the circuit court by pleading guilty to a crime.  
15 But the plaintiff had misled the U.S. District Court and  
16 later, the Fourth Circuit by attempting to argue and plead  
17 contrary to the position that he had taken in the  
18 underlying matter and essentially prevailed on.

19 We have that case. We in fact have a stronger  
20 case than Lowery v. Stovall on judicial estoppel in that  
21 way because this is not a case where -- like Lowery v.  
22 Stovall, this is an adopted set of state of facts. These  
23 are the facts that the plaintiff took, put before the  
24 Circuit Court for Baltimore City, argued painstakingly  
25 over dozens of pages that this was a notoriously corrupt

1 prosecutor who suborned perjury by allowing witnesses to  
2 testify that Burgess was not the shooter. That's a  
3 serious statement. That means that the prosecutor had  
4 this document in advance. Factually is that true? Don't  
5 know. It doesn't matter for judicial estoppel --

6 THE COURT: Okay. Let's move on to the statute  
7 of limitations thing because we have limited time.

8 MR. DAHL: That's fine.

9 THE COURT: So is it your argument then that  
10 there are -- why isn't this covered more by a situation of  
11 Heck in which we need to wait until we actually know that  
12 these convictions are vacated and that there's no  
13 potential prosecution coming forward in terms of how I  
14 find the date on which the clock begins to run?

15 MR. DAHL: Absolutely. Well, for statute of  
16 limitations to be clear, there is only one federal count,  
17 a federal count to which Heck would apply and which we  
18 have moved in our papers. That's Count Three for unlawful  
19 detention. And that is covered by Wallace v. Kato. Okay.  
20 The statute of limitations --

21 THE COURT: So you're not arguing -- well, maybe  
22 it's the City, I'm not sure or the department. But you  
23 are not arguing for a statute of limitations or dismissal  
24 based on statute of limitations except on Count Three?

25 MR. DAHL: We have not so moved, Your Honor.

1 THE COURT: Okay.

2 MR. DAHL: We didn't move on Count One or Count  
3 Two. Those are malicious prosecution based counts. And  
4 as this Court is likely aware, this summer in McDonough v.  
5 Smith, United States Supreme Court held that a  
6 fabrication-based claim sounding essentially in malicious  
7 prosecution accrues at the date of the nol pros.

8 THE COURT: Okay.

9 MR. DAHL: We had expected that to be the case.  
10 We highlighted that the case was on cert. It didn't come  
11 down our way. Such is life.

12 THE COURT: Okay.

13 MR. DAHL: But no. We are --

14 THE COURT: Well, Count Three is a false arrest  
15 effectively argument.

16 MR. DAHL: It is.

17 THE COURT: So you are trying to date that from  
18 the date of the arrest.

19 MR. DAHL: We are trying to date that from the  
20 date that the arrest became subject to legal process,  
21 which under wallace v. Kato, which is the date of the  
22 arraignment. But even stretching it out, if we were to  
23 apply the more liberal rule, supply the false arrest  
24 claims under Maryland law for whatever reason --

25 THE COURT: Um-hum.

1 MR. DAHL: -- that would stretch out to the date  
2 of the release which is March 23, 2015. So says the  
3 court's docket and that date is also recited in the  
4 plaintiff's LGTCA notice which is attached as Exhibit C to  
5 our motion to dismiss.

6 THE COURT: Okay.

7 MR. DAHL: So it's the matter of two different  
8 seizures. There's the seizure that occurred at the scene.  
9 That's the false arrest claim.

10 THE COURT: Count Three.

11 MR. DAHL: Count Three. And that may not even  
12 be frankly subject to the Heck bar. The wallace v. Kato  
13 case says if it's subject to the Heck bar, if a challenge  
14 on that, incarceration would attack the validity of the  
15 eventual conviction. It's conditional. It's entirely  
16 possible he could have brought that claim before his  
17 conviction. It's entirely possible he could have brought  
18 his claim after his conviction. He can't bring it now.  
19 It became time barred on March 23rd, 2018. It is too  
20 late. And that's a very short -- it's a claim that  
21 relates to a very short --

22 THE COURT: So I understand that. But are you  
23 arguing for a statute of limitations on any other counts  
24 such as Counts Four and Nine or no longer are you pursuing  
25 those?

1 MR. DAHL: Count Four. Yes. I'm sorry. We  
2 have argued for Count Four. Count Nine is a state law  
3 claim which would not be a Heck bar situation. We argued  
4 on Count Four because there is no case law in this state  
5 and the plaintiff has cited no case law in any other  
6 jurisdiction stating that a failure to intervene claim  
7 gets the same rule of deferred accrual as a malicious  
8 prosecution claim.

9 We have cited reported authority from the  
10 Northern District of New York. In response, the plaintiff  
11 has cited no case. We think that the Northern District of  
12 New York is right on the issue. The statute of  
13 limitations are always a balancing test. That's  
14 elucidated in or the application arises from a balancing  
15 test as a matter of public policy. That is elucidated in  
16 the wallace v. Kato case. That there are interests in  
17 getting -- having claims brought promptly. And someone  
18 who is accused of failure to intervene for having been at  
19 the scene is differently positioned, particularly on a  
20 30-year-old claim, from someone who is intimately involved  
21 or alleged to have been intimately involved in the actual  
22 investigation and malicious prosecution.

23 THE COURT: So isn't a failure to intervene  
24 comparable to accomplice liability?

25 MR. DAHL: It is a matter of bystander liability

1 and I would not -- I would be loathed to borrow from the  
2 criminal law on the accrual of statute of limitations.  
3 The --

4 THE COURT: And why should it be a different  
5 rule?

6 MR. DAHL: It should be a different rule --

7 THE COURT: Other than just the general  
8 principle you want to get these things over with. But  
9 again if you are accepting a malicious prosecution goes  
10 out to a certain date, why wouldn't it be the same rule?

11 MR. DAHL: It wouldn't be the same rule for the  
12 same policy reasons that say that unlawful detention under  
13 a wallace v. kato claim doesn't go out to the --

14 THE COURT: If I'm not mistaken, the failure to  
15 intervene is not necessarily about the arrest. It's about  
16 this whole episode. Correct?

17 MR. DAHL: It's not incredibly clearly pleaded  
18 what it's about.

19 THE COURT: Fair point.

20 MR. DAHL: So we are granting the plaintiff  
21 every possible interpretation.

22 THE COURT: Isn't that what I'm supposed to do  
23 on a motion to dismiss?

24 MR. DAHL: And that's what we're doing in  
25 response in so moving to dismiss.



1 THE COURT: Okay. Okay. Now just to make sure  
2 there's enough time for the -- for Baltimore City, I'm  
3 trying to see what other issues we have.

4 There are -- on your LGTC -- are you -- let me  
5 just make sure about this. Who is arguing the LGTCA? Is  
6 that you?

7 MR. DAHL: That is me.

8 THE COURT: Okay. So I guess I'm trying to  
9 understand the argument here. Is it that they moved too  
10 early or they gave notice too early in some fashion or is  
11 it that the notice was insufficient in some way or both?

12 MR. DAHL: Well, it's either depending on which  
13 count it relates to. Our argument is that it came too  
14 early as to one of the counts. That being the count for  
15 state law and malicious prosecution. State law and  
16 malicious prosecution had not yet accrued at the time that  
17 the notice was sent because it doesn't accrue until the  
18 date of the nol pros, until the date of the dismissal.  
19 This predated it. It was never renewed.

20 But as to both malicious prosecution and all of  
21 the other state law counts, there's no allegation, no  
22 reasonably specific allegation that could reasonably  
23 contemplate time, place and cause under CJP 5-304 against  
24 any of the officers to whom I represent. The only officer  
25 who is named in the LGTCA notice is Joseph Mueller and all

1 that's said about Joseph Mueller is that he gave false  
2 testimony. well, false testimony is not the subject of a  
3 1983 claim. He's immune for that. Briscoe v. LaHue. So  
4 a municipality receiving this document would look at that  
5 and so conclude.

6 And the municipality would also look and see  
7 that there were some allegations about documents being  
8 withheld, information being withheld. It doesn't say by  
9 whom. It just says -- makes reference to a petition for  
10 writ of actual innocence. So I mean is the municipality  
11 looking at that? And I can't speak for what the  
12 municipality actually did. I don't represent them. But  
13 would have walked down Fayette Street, taken a right up  
14 Calvert Street, gone to the courthouse, pulled a petition  
15 and read a very compelling story about how a crooked  
16 prosecutor withheld a document and reasonably concluded  
17 that the officers had done nothing wrong.

18 The municipality was not on notice of these  
19 claims. The officers were not on notice of these claims  
20 until they were sued and it's too late and that applies to  
21 all of the state law claims.

22 THE COURT: Okay. So I think we have  
23 approximately six minutes left for the City. Should we go  
24 to them?

25 MR. DAHL: I will yield and rest on my papers as

1 to the balance of the arguments, Your Honor.

2 THE COURT: Thank you. So, Ms. Lynch, one thing  
3 I wanted to ask at the outset is are you or are you not  
4 pursuing this Eleventh Amendment theory? You didn't raise  
5 it in your opening brief. I think that to some degree is  
6 grounds even to just reject the argument outright. But it  
7 was responded to in the surreply. So I think I have at  
8 least heard from both sides on that issue. Are you  
9 pursuing that or not?

10 MS. LYNCH: We certainly are pursuing that, Your  
11 Honor. Eleventh Amendment immunity is jurisdictional. It  
12 is subject matter jurisdiction --

13 THE COURT: Under what case?

14 MS. LYNCH: Under Cunningham versus General  
15 Dynamics, 888 F.3d 640 and that's a 2018 Fourth Circuit  
16 case wherein the Fourth Circuit stated that sovereign  
17 immunity is a jurisdictional bar to suit.

18 THE COURT: Sovereign immunity or Eleventh  
19 Amendment immunity?

20 MS. LYNCH: Eleventh Amendment immunity. But  
21 they use the term sovereign immunity.

22 THE COURT: Was it an Eleventh Amendment case?

23 MS. LYNCH: Yes. I believe so.

24 THE COURT: Okay.

25 MS. LYNCH: It was actually --

1 THE COURT: What was it again?

2 MS. LYNCH: 888 F.3d 640.

3 THE COURT: So I guess what I'm wondering is I  
4 know you've cited one of the cases from Judge Hollander  
5 from this year. But that appears to be in my view an  
6 outlier, particularly since it did not go through the type  
7 of analysis that the Fourth Circuit has asked for. It  
8 basically assumed because a case -- an entity is a state  
9 agency for purposes of state sovereign immunity that it is  
10 for the Eleventh Amendment and that's not been the test  
11 historically. So what am I missing?

12 MS. LYNCH: I don't think outlier is necessarily  
13 a fair characterization. Judge Hollander issued two  
14 decisions both in March of 2019 stating that BPD is a  
15 state agency since 1867 and is, therefore, not subject to  
16 Monell liability --

17 THE COURT: That's one of the four-part tests  
18 that it -- the State views it as a state agency and I  
19 don't think anybody disputes that that's true. But what  
20 about the other elements of the test?

21 MS. LYNCH: As to the other elements of the  
22 test, admittedly there was a practice in the federal  
23 district courts based on Chief Judge Kaufman's opinions in  
24 the 1980's that the City and/or the BPD could be sued  
25 under 1983 because the BPD and the City were viewed as

1 being two connected.

2 Since the time of those decisions, there has  
3 been a shift in the law and I don't mean exclusively the  
4 Hollander cases, although there was another Judge Russell  
5 case, Garner v. Hope, which is cited in our pleadings and  
6 there was another reported decision from I believe Judge  
7 Williams of this court which was Dixon versus Baltimore  
8 Police Department and that's 345 F.Supp. 2D 512.

9 But since Judge Kaufman's decisions, the law  
10 changed in that in 2002, the Supreme Court in Federal  
11 Maritime versus South Carolina State Ports Authority,  
12 that's 535 U.S. 743 said that the central purpose of  
13 sovereign immunity of Eleventh Amendment immunity is not  
14 to protect the state's purse, but is to protect the  
15 dignity of the sovereign.

16 Reading the Supreme Court precedent, the Fourth  
17 Circuit in 2012 and then again in 2015 in the Oberg line  
18 of cases found that given the Supreme Court's statement,  
19 the impact on the state treasury is no longer dispositive,  
20 not only is it no longer dispositive, but it must be given  
21 equal weight with the other factors.

22 And as to those other factors, Your Honor, the  
23 court in Strohman v. Anderson, which is cited in our  
24 papers, found that this perceived connection between the  
25 City and the BPD did not exist and in fact Judge Russell

1 said that there's mountains of law, decades of facts and  
2 statutes which show that that connection simply is not  
3 there. As to the --

4 THE COURT: But the State is actually running  
5 and operating this police department? It's one thing to  
6 say that they are -- have independence from the City, but  
7 it's another thing to say that they are basically being  
8 operated by the State.

9 MS. LYNCH: Absolutely, they are, Your Honor.  
10 The public local laws actually are laws passed by the  
11 general assembly. They are passed by the State. The  
12 State under those laws vested the commissioner with powers  
13 just as the State would with any other state agency had.  
14 It's indisputable that the commissioner is ahead of the  
15 state agency. The police department was --

16 THE COURT: Can I just ask generally? I mean  
17 you're saying the law changed in 2002 because of a Supreme  
18 Court case which sounds somewhat unconnected to me. If  
19 the law changed 17 years ago, why was this argument not  
20 even in your opening brief?

21 MS. LYNCH: Your Honor, we have --

22 THE COURT: This department, it's not as if it  
23 never gets sued.

24 MS. LYNCH: We would have never fully abandoned  
25 this argument. It has always been --

1           THE COURT: But what triggered it? Just tell  
2 me. Is it the Hollander case? What made you bring this  
3 up -- dredge this up when, you know, in 17 years you  
4 didn't -- maybe you did assert it. I don't know, but you  
5 certainly didn't get any ruling saying, you know, from a  
6 controlling authority that you have immunity here.

7           And again I find some of these other cases such  
8 as the Hollander case as completely not -- basically  
9 relying on the conclusion that because it's a state  
10 agency, that Eleventh Amendment immunity applies, which I  
11 just don't agree with. So again why bring this up now?

12           MS. LYNCH: Well, to be candid, the Hollander  
13 cases did lead us to reexamine this issue. But it has --

14           THE COURT: So why should it be decided now when  
15 you basically didn't raise it in your opening brief? I'm  
16 not sure why -- again I don't agree that this is  
17 jurisdictional, although I'll look at your case again.  
18 But generally Eleventh Amendment is not the same thing.  
19 And so why should we even entertain this eleventh-hour  
20 argument?

21           MS. LYNCH: Well, if it's Eleventh Amendment  
22 immunity, I do believe that it is jurisdictional. It's  
23 subject matter jurisdiction and it can be raised at any  
24 time.

25           THE COURT: Let me look at this case now. What

1 is it again? 888 F.3rd --

2 MS. LYNCH: 888 F.3rd 640.

3 THE COURT: What page are you looking at?

4 MS. LYNCH: The pin cite I believe is 649 and --

5 THE COURT: I'm still trying to understand how  
6 this is Eleventh Amendment and not some other form of  
7 sovereign immunity. Help me out.

8 MS. LYNCH: Well --

9 THE COURT: This is under the Telephone Consumer  
10 Protection Act. It's a federal sovereign immunity  
11 argument I believe. It doesn't seem to have anything to  
12 do with the Eleventh Amendment. But I'm just looking at  
13 it now for the first time. So point me to the part where  
14 this is about the Eleventh Amendment.

15 MS. LYNCH: I think the analysis is analogous I  
16 guess for sovereign immunity purposes. It has a  
17 coincidence of scope. And candidly, I don't have that  
18 case in front of me, Your Honor. But what I do have in  
19 front of me is a --

20 THE COURT: This is your whole argument is  
21 subject matter jurisdiction. I can decide it at any time.  
22 I must decide it at any time. And you don't even have the  
23 case in front of you.

24 MS. LYNCH: I apologize.

25 THE COURT: Where it seems to me like it's being



1 mis-cited.

2 MS. LYNCH: Well, I do have another case in  
3 front of me, which is Van Story versus Washington County  
4 Health Department and that was just decided on July 25,  
5 2019 and I only have the --

6 THE COURT: Okay. Give me that cite.

7 MS. LYNCH: I have the Westlaw citation for  
8 this.

9 THE COURT: So it's an unpublished case or it's  
10 a brand new case?

11 MS. LYNCH: I think it is -- it's a brand new  
12 case. There's nothing on here that indicates that it has  
13 been selected for publication or that it has not been  
14 selected.

15 THE COURT: Okay. Give me the citation then.

16 MS. LYNCH: It's 2019 WL-3340656. And if I  
17 could direct the Court's attention to page 3 of that  
18 opinion? Directly above the Subpart 2 that says Rule  
19 12(b)(6), there is a paragraph which explains the -- this  
20 is an Eleventh Amendment immunity case and there's a  
21 paragraph that explains the Fourth Circuit's reiteration  
22 that defense of sovereign immunity is a jurisdictional  
23 bar.

24 THE COURT: I'm still not seeing where it  
25 references the Eleventh Amendment.

1 MS. LYNCH: In the Van Story case?

2 THE COURT: Yes.

3 MS. LYNCH: The Van Story case is an Eleventh  
4 Amendment immunity case. Let me see if I can -- on page 7  
5 of the opinion under subsection, Sovereign Immunity and  
6 then the second paragraph, the court begins the Eleventh  
7 Amendment analysis. Under the Eleventh Amendment states  
8 generally enjoy immunity from suits brought in federal  
9 court by their own citizens and continues from there.

10 Certainly, Your Honor, if the Court would find  
11 post-argument briefing helpful, that's something that we  
12 would be more than willing to provide.

13 THE COURT: So anyways, your best case on all of  
14 this is Van Story on the subject matter jurisdiction  
15 question. But then on the merits of your argument about  
16 the Eleventh Amendment is what?

17 MS. LYNCH: Our argument about the Eleventh  
18 Amendment is -- excuse me -- well, as far as the four  
19 factors that the Court is required to consider, the state  
20 treasury being one of them, but not being the predominant  
21 factor, whether the agency exercises autonomy, whether  
22 there are state or local concerns and the classification  
23 pursuant to state law, I think that the classification  
24 pursuant to state law is, you know, sort of a slam dunk  
25 for us. I don't think that's contested.

1           We do admit that at this point in time that  
2 judgments are paid from the City. So that admittedly is  
3 not all the way in our favor at this time. As to the --

4           THE COURT: Or at all in your favor?

5           MS. LYNCH: It's not in our favor at this time,  
6 Your Honor.

7           As to the second and third arguments, the state  
8 versus local concerns, in the Owens case, which the Fourth  
9 Circuit decided in 2014, which is cited in the briefs, the  
10 court there didn't pass upon it, but it did recognize that  
11 the district court found that the State's Attorney, the  
12 Office of the State's Attorney had Eleventh Amendment  
13 immunity and they are a similar agency to the Baltimore  
14 Police Department in prosecuting laws that occur in the  
15 state -- I'm sorry -- prosecuting state laws in Baltimore  
16 City. The public local laws again are enacted by the  
17 general assembly and install the commissioner as the head.  
18 He has the authority to --

19           THE COURT: I guess I'm not quite sure I'm  
20 understanding that argument. Doesn't every police  
21 department in the state enforce state laws?

22           MS. LYNCH: Yes.

23           THE COURT: Prince George's County which is  
24 where we are sitting right now --

25           MS. LYNCH: The.

1 THE COURT: Unfortunately, for whatever reason,  
2 the U.S. Attorney here brings a lot of cases started by  
3 the Prince George's County Police Department. So we're  
4 very familiar with them. And I'm pretty confident that  
5 most of the laws they are enforcing are state laws.

6 So again I don't -- but they are clearly subject  
7 to Monell. So I guess I'm trying to understand why the  
8 fact that they are enforcing state laws makes their  
9 matters a statewide purview for the department --

10 MS. LYNCH: Well, it's just a factor of the  
11 analysis, Your Honor. There is also the fact that  
12 Baltimore is a large city where people come to work who  
13 are not Baltimore citizens. They use Baltimore City  
14 services. We have Oriole Park, concerts and events at  
15 First Mariner Arena that draw --

16 THE COURT: Why don't we move on to a different  
17 issue? So I think I can figure out the Eleventh Amendment  
18 issue from what I've heard.

19 What about the Monell argument? Tell me what  
20 your position is there.

21 MS. LYNCH: The plaintiff's Monell claim fails  
22 as a matter of law and I want to emphasize at the outset  
23 because I think with all the complexities and minutia of  
24 the case law, it's obvious but it can be sometimes easy to  
25 lose sight of the fact that in order to properly plead a

1 Monell claim, there must be facts in the complaint that  
2 make it plausible, not just possible, but plausible that  
3 the municipality through deliberate indifference caused  
4 the constitutional violation. And in order to do that,  
5 plaintiffs have put forth several theories, one of which  
6 is the failure to train theory.

7 And the Supreme Court in Connick v. Thompson  
8 said that when a complaint rests on a failure to train  
9 theory, a policy of inadequate training, it is at its most  
10 tenuous. In order to show this, the plaintiff must allege  
11 facts that make it plausible and identify the nature of  
12 the training, which they have not done. The policymakers  
13 which they have not identified had notice that the  
14 omission caused the constitutional violation and made a  
15 choice to retain that program in light of that knowledge  
16 and that's also the Connick case at pages 61 and 62. And  
17 then of course, they have to put forth facts that if  
18 proven would show that the training deficit caused the  
19 constitutional violation.

20 And with respect to the nature of the training,  
21 I'd refer the Court to page 12 of our motion and page 6 of  
22 our reply in the McDougal and McDowell cases which were  
23 decided fairly recently by Judge Hollander and Judge  
24 Russell respectively and those cases cite other cases such  
25 as Hall versus Fabrizio and the Peters case.

1           In those cases, the plaintiff claimed that there  
2       was insufficient training in the areas of arrest without  
3       or probable cause to arrest and improper searches. And  
4       the court held that that was bare bones absent any factual  
5       material -- factual allegations about the type of training  
6       that the officers actually received. It's not enough. In  
7       Canton v. Harris, the Supreme Court said that a general  
8       laxness of training or an allegation, you know, that more,  
9       better, different training could have prevented the  
10      constitutional violation is simply not enough.

11           With respect to the second element that must be  
12      supported in the pleadings, the policymakers had notice  
13      that the omission caused the violation of constitutional  
14      rights. That's missing as well. First, there's no  
15      factual material in the complaint to identify the  
16      policymaker who actually was responsible for the training  
17      program at issue.

18           There are five incidents that are in the  
19      complaint which I'm sure the plaintiffs will mention. All  
20      of those incidents postdate the constitutional violation  
21      in this case. There's nothing in the complaint that shows  
22      that in 1999, there would have been notice of a  
23      constitutional violation that -- I'm sorry -- that some  
24      deficit with the training was causing a constitutional  
25      violation, let alone that in light of that knowledge, the

1 policymaker was deliberately indifferent to the fact that  
2 this lack of training was violating people's  
3 constitutional rights and just chose not to change it.

4 If anything, the Tabeing Report, which also  
5 postdates which is referenced shows that --

6 THE COURT: What time period does that report  
7 cover though?

8 MS. LYNCH: The Tabeing Report? It does cover  
9 prior to 2000. But the report was not issued until 2000.  
10 So it would not have been able to put the policymaker on  
11 notice of anything.

12 With respect also to -- they identify -- the  
13 type of training is just some sort of nebulous failure to  
14 adequately train on Brady and failure to take training on  
15 proper investigatory steps. And with respect to that,  
16 there has to be a connection as to how that training would  
17 have caused an officer to do things like destroy or bury  
18 guns, to coerce witnesses into making up a false narrative  
19 and then burying a document that didn't agree with the  
20 false narrative because those are the constitutional  
21 violations at issue in this case.

22 And if the Court looks to Connick, again in that  
23 case, the court -- the Supreme Court held that the State's  
24 Attorney's Office couldn't have been on notice that there  
25 was a failure to train on Brady because the cases that the

1 plaintiff relied on in the complaint, which were cases  
2 that were years prior, not years subsequent as we have in  
3 this case. But they were a different type of Brady  
4 violation. So the court found that wasn't enough.

5 As to the condemnation theory of liability and a  
6 lot of the arguments here overlap with the arguments for  
7 failure to train as far as deliberate indifference goes  
8 and how that has not been shown. For condemnation, a  
9 plaintiff must show the policymakers knew, in this case in  
10 1999, that there was a practice so widespread and  
11 persistent, so firmly entrenched and established that it  
12 had the force of law, the force of law. And that is  
13 simply missing from this complaint. Again all of the --

14 THE COURT: So that's the condemnation theory.  
15 What about just the widespread practice? Is the standard  
16 the same or different in terms of what the leadership  
17 needed to know at that point in time?

18 MS. LYNCH: Yes. My understanding is that --  
19 when I say condemnation, what I mean is the widespread  
20 practice.

21 THE COURT: I see. Okay.

22 MS. LYNCH: The widespread practice of which  
23 there had to be notice, actual or constructive notice and  
24 for which there had to be a failure to correct it, not as  
25 a matter of negligence, not as a matter of gross



1 negligence, but as a matter of deliberate indifference.  
2 And there has to be something in the complaint that shows  
3 that, that that's plausible, not just possible, but  
4 plausible. And perhaps that's a high hurdle. It is a  
5 high hurdle. The court has called it a high hurdle.

6 with respect to another theory, which is a  
7 little bit ambiguous from the pleadings --

8 THE COURT: Can I ask since we're short on time  
9 here, I wanted to get this question in because it seemed  
10 like Mr. Dahl was acknowledging at this point that the  
11 malicious prosecution claims are not time barred. I  
12 believe my notes show that the City was also making that  
13 argument. Are you in agreement with Mr. Dahl or do you  
14 have a different position on that?

15 MS. LYNCH: Your Honor, since the Supreme Court  
16 decided McDonough v. Smith, we would agree with Mr. Dahl  
17 that we are no longer presenting that argument. However,  
18 we do join in Mr. Dahl's motion with respect to the  
19 statute of limitation argument as to the remainder of the  
20 counts.

21 THE COURT: Right. Three, Four and Nine I  
22 think.

23 MS. LYNCH: Yes. Oh, in particular, Count  
24 Three, which is the federal claim because the state law  
25 claims and I don't believe this is contested aside from

1 indemnification, BPD has sovereign immunity for state law  
2 claims under Cherkas v. Baltimore Police Department.

3 THE COURT: Okay.

4 MS. LYNCH: And I think that's not contested and  
5 that's well established.

6 THE COURT: You had one more issue you wanted to  
7 raise and then I'd like to go to the plaintiffs.

8 MS. LYNCH: With respect to indemnification,  
9 that's a state law claim that the plaintiffs I think  
10 believe that sovereign immunity does not apply to it, this  
11 claim fails as a matter of law because the case law is  
12 unequivocal that plaintiff doesn't have standing to bring  
13 it at this time because the BPD does have sovereign  
14 immunity.

15 The Court of Special Appeals was clear in  
16 Johnson v. Francis. That's cited in our brief, but it's  
17 239 Maryland App. 530 in 2018. That a plaintiff may not  
18 pursue a municipality unless and until judgment is entered  
19 against the employee and it is established that the  
20 employee was acting within the scope of employment. And  
21 that's the case because of the Local Government Tort  
22 Claims Act which waives Baltimore Police Department's  
23 immunity only to the limited extent of the duties the  
24 defendant indemnifies. So until those preconditions are  
25 met, that claim is premature. BPD has sovereign immunity

1 and it must be dismissed.

2 THE COURT: So you're asking us to sort of  
3 dismiss it, but then potentially if those items are shown,  
4 have us amend the complaint and later on, de-burden to the  
5 case. Is that what you are asking for?

6 MS. LYNCH: No. Not necessarily, Your Honor.  
7 In the Johnson v. Francis complaint, for example, the  
8 plaintiffs later brought an enforcement action. So there  
9 are other mechanisms through which the plaintiff can do  
10 that rather than bringing it in their case in chief, which  
11 they are not able to do because the Baltimore Police  
12 Department has sovereign immunity and the pre-conditions  
13 of the Local Government Tort Claims Act must be met. The  
14 Local Government Tort Claims Act does not authorize a  
15 direct suit against a governmental entity.

16 THE COURT: Okay. Why don't we hear then from  
17 Ms. Horn?

18 MS. HORN: Thank you, Your Honor.

19 This case involves a 16-year old who was the  
20 victim of a robbery who was later arrested and prosecuted  
21 for a murder when all along, the defendants knew that the  
22 real killer had confessed. That information was withheld  
23 from him throughout his criminal proceedings. And as a  
24 result, he was wrongfully convicted of a crime that he did  
25 not commit and spent many years in prison for that crime.

1 I know we have limited time. So I do want to  
2 jump to some of the arguments that the defendants have  
3 made to try to dismiss this case in its entirety and since  
4 the individual defendants started with judicial estoppel,  
5 I'll start there as well.

6 As this Court is aware, in order for a judicial  
7 estoppel to apply, all three of the elements of judicial  
8 estoppel have to be met. It's a conjunctive test and  
9 that's because judicial estoppel was meant to be applied  
10 sparingly. It was meant to be the exception rather than  
11 the rule. And I want to start with the elements --

12 THE COURT: How do you interpret the -- how  
13 things were handled on the petition -- at the petition  
14 phase? Mr. Dahl raises the point that the focus was on  
15 the prosecutor and one can infer from that that now that  
16 it's taking a contrary position now that the -- there is  
17 basically intentional misleading of the Court.

18 So other than saying that they've changed  
19 courses, you are -- I don't know if you were involved  
20 before, but that the plaintiff has changed course along  
21 the way for its own advantage, how else could I look at  
22 that record if at all?

23 MS. HORN: Yes, Your Honor. I think that --  
24 certainly, there was -- and we're not going to dispute the  
25 writ of actual innocence says what it says. The

1 statements in it say what they say. But I think the thing  
2 that's really important to keep in mind when you're  
3 looking at this is that for purposes of the criminal case,  
4 it didn't matter whether the prosecutor withheld the  
5 document or whether the police withheld the document.  
6 All --

7 THE COURT: I'm not sure Mr. Dahl agreed with  
8 that. So why don't you tell me how -- if this had been  
9 the officer, how the argument would have gone and why the  
10 plaintiff would have prevailed anyways?

11 MS. HORN: Because, Your Honor, the Brady  
12 violation is a violation that's committed by the State and  
13 Kyles versus Whitley says that information in the hands of  
14 a law enforcement officer is imputed to the prosecutor.  
15 They are one in the same for purposes of Brady.

16 It's only when you get into the civil litigation  
17 universe and I think even Mr. Dahl acknowledged that, that  
18 the spheres of liability matter. It matters in the civil  
19 context whether it was the police that withheld the  
20 document -- and information in the document or whether it  
21 was the prosecutor.

22 But in the post-conviction universe where  
23 Mr. Parks had to prove that the document was newly  
24 discovered, that it couldn't have been discovered sooner  
25 without due diligence, all that mattered was that it was

1 withheld by the State and the State is -- under Kyles and  
2 under well-established case law, the State is the police  
3 and the prosecutor.

4 THE COURT: But why focus so heavily on the  
5 prosecutor? why not make some sort of broader argument or  
6 argument in the alternative if your side honestly believes  
7 that this could have just been the officers and not just  
8 the prosecutor?

9 MS. HORN: Your Honor, there were statements in  
10 the petition or, sorry, the writ. I keep calling it a  
11 petition. I apologize. The writ that discussed the State  
12 having withheld evidence and the State having not produced  
13 documents or produce the Mueller report.

14 What Banks versus Dretke, a Supreme Court case  
15 says is that Brady is a matter of prosecutorial  
16 misconduct. And in that case, you describe the Brady as a  
17 matter of the prosecutor withholding the document because  
18 even though the courts have imputed information in the  
19 hands of the police officer to the prosecutor for purposes  
20 of Brady, it's ultimately the prosecutor that has to turn  
21 it over. I mean Banks calls Brady Brady prosecutorial  
22 misconduct. Even though in the Banks case, the person who  
23 withheld the document was in fact a police officer.

24 THE COURT: So what part of your complaint lays  
25 out the facts or tell me the theory under which this

1 really was the officers which would be somewhat different  
2 than what was offered on the writ? What are the factual  
3 allegations you can make now and where do those  
4 allegations come from that gives you the ability to make a  
5 different argument now?

6 MS. HORN: Your Honor, I believe the factual  
7 allegations are that as it's described starting at "police  
8 suppress Burgess' statement and other evidence" around  
9 paragraph 32, that Officer Mueller goes and speaks with  
10 Burgess, he takes his statement and that statement isn't  
11 disclosed. It's not in the prosecutor file which is pled  
12 later on.

13 So if you look at paragraphs 53 and 54,  
14 Mr. Parks got the prosecutor file. The Mueller report was  
15 not in it and during the writ of actual innocence also  
16 made an MPIA request for the prosecutor's file and it  
17 wasn't in it then either.

18 So, Your Honor, I think the allegations are that  
19 the document that we're describing, that we're talking  
20 about is not in the prosecutor's file. There's no reason  
21 to suggest that the prosecutor had it.

22 THE COURT: What about the notation on the  
23 document?

24 MS. HORN: Well, Your Honor, Mr. Dahl suggested  
25 that this Court could take judicial notice of that note

1 and certainly, this Court can take judicial notice that  
2 the document exists and that the note is on the document  
3 and the writing is there.

4 But to try to take judicial notice of what that  
5 actually means, I think is improper at this pleading stage  
6 and that is really what Mr. Dahl is asking you to do in  
7 this judicial estoppel argument and in other arguments.  
8 He's asking this Court to say when it says per Ms.

9 Costley, don't turn over this report -- I'm  
10 paraphrasing -- that this Court should interpret that to  
11 mean that that is exactly what happened. And that's not  
12 proper at this stage because that is a disputed issue.

13 THE COURT: But isn't that what your predecessor  
14 counsel argued on the writ, that the prosecutor had made  
15 that determination?

16 MR. DAHL: Well, Your Honor, I think what the  
17 prosecutor argued or, sorry, what our predecessor counsel  
18 argued at the writ stage was that the prosecutor didn't  
19 turn it over. And I know I sound like a broken record. I  
20 mean certainly, there is a statement in the writ of actual  
21 innocence that the report states X, Y and Z from -- it  
22 said per Ms. Costley. The document speaks for itself. It  
23 states that. Nobody is disputing that basic fact.

24 But again for purposes of the writ, the  
25 prosecutor is the one who is supposed to turn over



1 material. That is the prosecutor's job. And information  
2 that may only be in the hands of the police department is  
3 still imputed to the prosecutor under a long line of Brady  
4 case law starting with Kyles. And so I don't think that  
5 that issue is dispositive in this case.

6 And I would also like to if this Court will  
7 indulge me, one of the other factors that's required for  
8 judicial estoppel to apply is that the court relied on and  
9 actually adopted this version of events. That the court  
10 made some kind of finding that it was the prosecutor as  
11 opposed to the police officer that had this document. And  
12 there really is no evidence whatsoever of that.

13 In their reply, the defendants cited to the  
14 order suggesting that the order somehow gave this argument  
15 credence. But what the order actually says is "upon  
16 consideration of the writ -- of the petition for writ of  
17 actual innocence and there being no opposition by the  
18 State and for the reasons set forth at the hearing" --

19 THE COURT: What page are you on?

20 MS. HORN: I'm actually on Document 63-1, which  
21 I believe is Exhibit A to the individual defendants'  
22 reply.

23 THE COURT: Okay. Go ahead.

24 MS. HORN: what the order actually says is that  
25 the reasons why the court was granting the writ were the

1 reasons set forth at the hearing in the above-captioned  
2 case on March 3, 2015. And if you go to the hearing  
3 document which was attached to our response, all that's  
4 said at the hearing is the State represents that it's  
5 conducted a thorough investigation, that Officer Mueller  
6 has authenticated the handwriting on his own report and  
7 that the State believes that --

8 THE COURT: What page are you on for this?

9 MS. HORN: Sure, Your Honor. It is -- I believe  
10 it is Exhibit A to Plaintiff's --

11 THE COURT: 58-1?

12 MS. HORN: 58-1. Yes, Your Honor.

13 THE COURT: And where are you referring to?

14 MS. HORN: I'm looking at page 4 specifically.  
15 Pages 3 and 4 I suppose where Mr. Gioia is speaking.

16 THE COURT: Which part?

17 MS. HORN: Sure. Your Honor, what Mr. Gioia  
18 says --

19 THE COURT: And who is Mr. Gioia again?

20 MS. HORN: He's the State's Attorney.

21 THE COURT: Okay.

22 MS. HORN: What he says is that the -- and this  
23 is on page 3 -- he says "the State has carefully gone over  
24 the material" at line 17 and 18. At line 19, he says "the  
25 State has conducted an extremely thorough investigation in

1 this case, including interviewing witnesses, most  
2 importantly, a Baltimore police officer who offered a  
3 report that was attached as an exhibit to the petition"  
4 and then he goes on to say that "the officer is present in  
5 court, he has authenticated that document partially, he  
6 has authenticated his handwriting and his signature." And  
7 then in the next paragraph that follows at lines 2 through  
8 12 --

9 THE COURT: Who is he referring to? He's  
10 referring to --

11 MS. HORN: Officer Mueller, Your Honor.

12 THE COURT: Okay.

13 MS. HORN: He says that had -- I'm starting at  
14 line 5. "Frankly, had the jury had, had Mr. -- the  
15 nonfatal shooting Mr. Burgess been impeached with a police  
16 report or by the testimony of a police officer in this  
17 case, I think it would have created a significant or  
18 substantial possibility of a different result as it would  
19 have cast -- it would have supported the self-defense that  
20 was raised by Mr. Burgess in this case -- I'm sorry --  
21 Mr. Parks, excuse me, and then he says for that reason,  
22 we're agreeing." And the court literally just says "okay,  
23 all right, well, thank you very much, Mr. Gioia; I assume  
24 there is no opposition to that, Ms. Sansone; is that  
25 right?" And she says no.

1                   So the reason why Mr. Parks' writ of actual  
2                   innocence was granted is not because the court adopted  
3                   wholesale the arguments in Mr. Parks' writ of actual  
4                   innocence nor is there any indication whatsoever that the  
5                   court ever made a determination about who was at fault for  
6                   not turning over the Mueller report. What the court does  
7                   is agree with the State's assessment that had the report  
8                   been turned over, there's a substantial possibility of a  
9                   different trial.

10                  THE COURT: So the State didn't really contest  
11                  the ultimate result. Correct?

12                  MS. HORN: The State -- that is correct, Your  
13                  Honor.

14                  THE COURT: So it didn't insist on a factual  
15                  finding on exactly how we got there? Is that your  
16                  argument?

17                  MS. HORN: That is correct, Your Honor. There  
18                  was no factual finding made by any party, not by the State  
19                  or by the court or even by Mr. Parks himself.

20                  And so ultimately, regardless of whether there  
21                  was inconsistencies in the factual statements, the  
22                  defendants can't meet the prong of judicial estoppel that  
23                  requires the court to have relied on or adopted this  
24                  alleged inconsistent factual position and so estoppel is  
25                  out the door.

1 THE COURT: Let me ask you about your conspiracy  
2 counts.

3 MS. HORN: Sure.

4 THE COURT: And the defendants say everyone in  
5 this is part of the department with the possible exception  
6 of the prosecutor and you don't really give any specific  
7 facts in the complaint that explain how this prosecutor  
8 was involved in this alleged conspiracy. So what detail  
9 is there to meet the low, but still significant bar to get  
10 you past this motion?

11 MS. HORN: Sure, Your Honor. I think that the  
12 argument essentially -- but the argument that was raised  
13 by the defendants in their brief was that because of  
14 judicial estoppel, we could not -- well, there's an  
15 intracorporate conspiracy doctrine that precludes  
16 plaintiff from proceeding just against BPD. We don't  
17 dispute that. We agree with that.

18 what we're saying is if you accept the  
19 defendant's argument that this Court should take judicial  
20 notice of this document that's referenced in plaintiff's  
21 complaint and attached to the defendant's motion to  
22 dismiss and make a factual determination about the meaning  
23 of that note on the document, then there still is a viable  
24 conspiracy claim because what the allegations are in the  
25 conspiracy count is that there is a conspiracy between BPD

1 and another --

2 THE COURT: I guess I'm saying -- you're asking  
3 me basically to adopt something from the defendant's brief  
4 as being part of the complaint. I guess I'm trying to ask  
5 where in the complaint does it say that you have some  
6 factual allegations to show that it was the prosecutor and  
7 these officers who were colluding or conspiring. You are  
8 just saying, well, they've sort of acknowledged this in  
9 their complaint, although even then, it's not clear they  
10 are acknowledging a conspiracy. At most, they are  
11 acknowledging facts to support a individual violation by  
12 the prosecutor who is not the defendant. So they're not  
13 even acknowledging that there was some sort of group  
14 effort here.

15 MS. HORN: I understand, Your Honor. And in  
16 candor, there aren't specific facts in the complaint that  
17 lay out this alternate conspiracy theory where the  
18 prosecutor tells them don't turn this over and they all  
19 conspire to do that.

20 I suppose the argument was made in the  
21 alternative. To the extent that the Court is going to  
22 adopt the defendant's version of this case, then there can  
23 be still be a viable claim --

24 THE COURT: But their version is that to use the  
25 old adage with conspiracies, that the prosecutor was

1 acting alone, isn't it?

2 MS. HORN: Well, I'm not sure of that, Your  
3 Honor. I mean certainly --

4 THE COURT: Well, they're not acknowledging that  
5 their clients were doing anything wrong I don't think.

6 MS. HORN: Certainly they're not acknowledging  
7 that their clients were doing anything wrong. But their  
8 argument was essentially we turned the document over to  
9 the prosecutor so we've washed our hands.

10 And all that I was trying to say and to the  
11 extent that this court would permit us to leave to replead  
12 facts to support this claim, is that even if under these  
13 circumstances, the police officers disclosed this document  
14 to the prosecutor and the prosecutor said to them, don't  
15 turn that over, there still can be a conspiracy claim  
16 because they knew -- they weren't turning it over to a  
17 competent authority. They knew they were violating  
18 defendant's rights. They knew she said don't turn it  
19 over, don't give it to me, don't give it to the defendant.

20 THE COURT: So are these additional facts you  
21 have at your disposal now or do you really need discovery  
22 to develop those kinds of facts?

23 MS. HORN: I think we need further discovery to  
24 develop those kinds of facts. But I do think we could  
25 replead. To the extent that this Court is going to give

1 credence to this note on the document and have it mean  
2 what the defendants say it means, I think that there is  
3 still a universe in which a conspiracy count can exist  
4 because you can't discharge your obligation by turning a  
5 document over to somebody who says, hey, hey, that may be  
6 a smoking gun, but don't disclose it.

7 THE COURT: Okay. Why don't we go briefly to  
8 the Eleventh Amendment argument that I spent some time  
9 with with Ms. Lynch about.

10 MS. HORN: Sure. I do want to preface that I  
11 haven't had an opportunity to read the case law that she  
12 cited. This is all new -- these are new arguments to us  
13 and we would and we have argued waiver. So I just want to  
14 preface that I can't speak to those specific claims that  
15 she made regarding the jurisdictional -- the specific  
16 cases she talked about.

17 What I can say is this. That the cases that  
18 they cite for the proposition that the Baltimore Police  
19 Department should have sovereign immunity don't actually  
20 conduct any analysis of the four-factor test. And  
21 regardless of whether there's a Supreme Court case that  
22 suggests that there is, you know, now less of a primacy  
23 placed on the treasury or the deep pockets, there still  
24 are these four factors that the Court has to analyze and I  
25 didn't hear her suggest that there had been some



1 jettisoning of that particular test.

2 And I think if you look at that test and we  
3 cited a case, Alderman, the test really points towards  
4 BPD's not having Eleventh Amendment immunity for purposes  
5 of a Monell claim. As they've conceded, the City pays the  
6 judgments.

7 The second factor, the autonomy from the State,  
8 there is -- although the -- I think that there is some  
9 confusion. I mean there is a connection between the City  
10 and the Baltimore Police Department and that certainly  
11 suggests that the City is separate from the State.

12 But there is also no evidence that I've seen or  
13 no pleading, no allegations that the State somehow  
14 controls the Baltimore Police Department other than  
15 setting it up as an agency. And we sort of describe some  
16 of the ways in which the City and the Baltimore Police  
17 Department are linked. The City appoints and removes the  
18 police commissioner. They collaborate on the budget.  
19 They authorize a number of Baltimore Police departments  
20 they can hire, set employee salaries, the commissioner  
21 apprises the Mayor and the City Council of information.  
22 So I think that that factor, the autonomy from the State  
23 cuts in the direction of finding that BPD does not have  
24 Eleventh Amendment immunity.

25 The third factor, whether it has a local versus

1 state concerns, I agree with the Court that simply saying  
2 that they enforce state laws doesn't cut it. Their  
3 jurisdiction is local. Their jurisdiction is the City of  
4 Baltimore. They serve the citizens of the City of  
5 Baltimore. I think that the Alderman case actually  
6 discussed this argument that because they are enforcing  
7 criminal law, they somehow have, you know, serve the State  
8 and rejected it. And for good reason as this Court has  
9 recognized that all police departments are enforcing laws  
10 that were created by the State.

11 The last factor of how it's classified under the  
12 state law, certainly we aren't disputing that BPD has been  
13 created as this anomaly as a state agency. But we would  
14 submit that there are instances where it is not treated  
15 completely as a state agency and I think the Local  
16 Government Tort Claims Act is one of them. You know, they  
17 are considered a local government for purposes of that act  
18 including for indemnification as counsel discussed  
19 earlier.

20 So, you know, from our perspective, this is  
21 actually a fairly straightforward application of the  
22 four-part test leads to the conclusion that BPD should not  
23 have Eleventh Amendment immunity. And relying on these  
24 cases that simply say because it's a state agency that has  
25 immunity doesn't cut it because it doesn't actually

1 analyze the factors.

2 The other argument -- I don't know if you have  
3 any specific questions --

4 THE COURT: Well, not really. You had raised  
5 the LGTCA. So I wanted to ask you about that. If there  
6 is something else you want to add on immunity though?

7 MS. HORN: No, Your Honor.

8 THE COURT: Okay. So then there is the question  
9 of timing here and does it make a difference whether you  
10 file your notice before the action accrues? Obviously,  
11 you've argued when the action accrues for purposes of  
12 other claims. You are really kind of stuck with that  
13 time. Why isn't that a problem? This statute does -- is  
14 very prescriptive about timing requirements, isn't it?

15 MS. HORN: Your Honor, certainly, we aren't  
16 disputing the time that when a claim accrues,  
17 specifically, when the malicious prosecution claim  
18 accrued.

19 Our argument is that there was substantial  
20 compliance because the facts underlying that claim are all  
21 there in the notice. The notice identifies the case  
22 number. It identifies the crime. It identifies the fact  
23 that he -- I mean I think it goes through a number of  
24 labels, some different potential causes of action that he  
25 might have.

1           And the case that the defendants cited is this  
2       court's case, the Edwards case. And I think that Edwards  
3       is very different from the facts that we have here. In  
4       Edwards, the two incidents where the plaintiff had alleged  
5       that she had been denied proper accommodation actually  
6       happened well before the constructive notice, let's say,  
7       had even been given. So that the fact -- the jurisdiction  
8       couldn't even investigate those incidents because they  
9       hadn't happened yet.

10           The malicious prosecution claim is very  
11       different because the underlying set of facts, that  
12       investigation and the prosecution had already occurred.  
13       All that hadn't happened yet was that was the prosecutor  
14       dismissed the charges against Mr. Parks.

15           THE COURT: What about the failure to reference  
16       the various defendants in our case?

17           MS. HORN: Sure. I would also argue substantial  
18       compliance and I think that the Burgess versus this  
19       Baltimore Police Department case is instructive on this.  
20       In that instance, a number of defendants were added to the  
21       case and there was an argument that because their names  
22       weren't specifically listed, somehow that made the notice  
23       improper. And what the court found was no, there was  
24       substantial compliance because the police department could  
25       still investigate the claims.

1 I mean at the end of the day, what the Watson  
2 case says about substantial compliance is that the police  
3 or the municipality have the opportunity to actually  
4 investigate and that opportunity was provided in this  
5 particular case. It does say Officer Mueller and others.  
6 We recognize that. We aren't disputing that. But I think  
7 that under the case law of substantial compliance, that is  
8 sufficient.

9 THE COURT: Okay. What about the Monell  
10 argument then? So which theory are you pursuing here? Is  
11 it failure to train? Is it a widespread practice? What  
12 is your argument here?

13 MS. HORN: We are pursuing both, Your Honor. We  
14 are pursuing a failure to train on Brady obligations and  
15 we are also pursuing a widespread practice of withholding  
16 and fabricating evidence.

17 And what I heard counsel say was, you know,  
18 it's -- I think her words were specifically it's a high  
19 hurdle. But the Owens case actually says the opposite.  
20 What Owens says is it's not hard to plead a Monell claim.  
21 What it's hard to do is to prove it. And I think that  
22 what counsel repeatedly referenced the Connick case in her  
23 discussion of our claims. Well, Connick was a case that  
24 arose after a verdict.

25 Certainly, we don't dispute that through

1 discovery, we have to prove each of the elements of a  
2 Monell claim, including things like identifying a  
3 policymaker, proving deliberate indifference. But that's  
4 very different from what we have to do at the pleading  
5 stage. And I think that Owens really controls this case.

6 And if you look at Owens and you look at the  
7 allegations in Owens, we've far surpassed what Owens did.  
8 Owens said there were "reported and unreported cases" and  
9 that there had been successful motions. That was the sum  
10 total of the allegations that the Fourth Circuit found  
11 sufficient.

12 THE COURT: So Ms. Lynch makes a -- I don't  
13 think she said this entirely explicitly. But I infer from  
14 it that she says that to the extent you can plead that  
15 there are incidents similar to this or incidents of  
16 withholding evidence if they happen after your events,  
17 that they are not helpful on this point because -- not  
18 necessarily arguing that there is no pattern, but it  
19 hadn't been established at the time of the incidents in  
20 question in your case. So what is your response to that?

21 MS. HORN: Sure, Your Honor. What the  
22 allegations were is that during this timeframe, the  
23 relevant operative period, there were incidents, similar  
24 incidents of due process violations that occurred in other  
25 cases. And then we provided five examples.

1                   Now all of the withholding or due process  
2                   violations that occurred in those cases occurred in the  
3                   operative time period, occurred prior to Mr. Parks'  
4                   arrest, prosecution -- arrest, investigation and  
5                   prosecution. What I believe counsel is getting at --

6                   THE COURT: Which paragraphs are you referring  
7                   to? She seemed to say that they were after. I don't know  
8                   if that's --

9                   MS. HORN: Well, what I believe she is referring  
10                  to is that the exonerations were after and that's  
11                  certainly not in dispute. The exonerations of these  
12                  gentlemen who served decades in prison occurred after  
13                  Mr. Parks' conviction. But I don't think that's kind of  
14                  neither here nor there for these purposes. Again we're at  
15                  the pleading stage. So these examples provide examples of  
16                  just as Owens required of reported and unreported cases  
17                  where there were due process violations.

18                 THE COURT: So it looks like at least the way  
19                 you've pleaded it that these -- the alleged withholding  
20                 which presumably would have happened prior to the  
21                 convictions happened in the '80s and '90s. But then the  
22                 exonerations as you said occurred in the 2010's for the  
23                 most part.

24                 MS. HORN: That is correct, Your Honor.

25                 THE COURT: Okay.

1 MS. HORN: And my concern is that I think that  
2 counsel is trying to graft onto these Monell cases  
3 requirements for pleading that just simply don't exist.  
4 There may be individual district court cases that have  
5 asked plaintiffs to identify the policymaker or some such  
6 thing, but that's really not what the Fourth Circuit has  
7 said. The Fourth Circuit has said in Owens, it's easy to  
8 plead these cases. The high hurdle comes when you have to  
9 prove them. I think that between the Tabeing Report and  
10 the examples that we have given, we are far past the issue  
11 of whether we have pled sufficient facts to get over the  
12 Rule 12 hump.

13 I would like an opportunity if this Court will  
14 indulge me to discuss the Heck issue on the Manuel claim.

15 THE COURT: On the which claim?

16 MS. HORN: On the unlawful detention claim.

17 THE COURT: Yes. Go ahead.

18 MS. HORN: Count Three, Your Honor. The  
19 McDonough case that was issued this summer by the Supreme  
20 Court talks about the fact -- and McDonough involved there  
21 was initially a mistrial and then subsequently after the  
22 mistrial, he was retried and he was acquitted and the  
23 allegation in McDonough was fabrication of evidence.

24 And what McDonough said when trying to decide  
25 about when the statute of limitations for a fabricated



1 evidence claim like the one McDonough had where he was  
2 subsequently acquitted, it doesn't begin to run until the  
3 criminal proceedings against the defendant have terminated  
4 in his favor.

5 And what the McDonough case basically explains  
6 is it's not just -- Heck doesn't just bar you from  
7 bringing a suit where there's a conviction. It also bars  
8 you from bringing a suit where that suit would impugn the  
9 validity of ongoing criminal proceedings. It says there's  
10 not a complete and present cause of action to bring a  
11 fabricated evidence challenge to criminal proceedings  
12 while those proceedings are ongoing.

13 And while we recognize that --

14 THE COURT: How does that spin out here? I mean  
15 I don't think that's that much of an extension of Heck if  
16 it is one. But why is this, the lawfulness of this  
17 detention --

18 MS. HORN: Because, Your Honor, I think --

19 THE COURT: -- going to affect the validity of  
20 the conviction here?

21 MS. HORN: well, for two reasons. First, the  
22 same evidence was used to detain him pretrial as was used  
23 at the actual trial. So were he to bring a claim for  
24 unlawful detention during his, you know, when the  
25 detention began or even upon his release in March of 2015,

1 he would be Heck barred because the very proof of that  
2 unlawful detention would be the same proof that would be  
3 used to attack his criminal conviction. It was the same  
4 evidence. So he couldn't bring it until it had terminated  
5 completely in his favor. What McDonough says is you can't  
6 bring a claim that would impugn the validity of criminal  
7 proceedings.

8 So from March of 2015 all the way until his  
9 conviction was overturned in October or, sorry, the  
10 charges were dismissed in October of 2015, he still had  
11 criminal proceedings pending. He was still under  
12 indictment. He was still subject to a retrial. And so  
13 that period of time can't -- he can't have been required  
14 to have brought a claim for unlawful detention in that  
15 period of time because to do so would civilly attack or  
16 collaterally attack the same evidence that was being used  
17 to prosecute him.

18 And McDonough has some language that talks not  
19 only about the legal problems with using civil litigation  
20 to collaterally attack the criminal proceeding, but also  
21 that talks about some of the policy concerns. So the  
22 concern with avoiding parallel litigation, avoiding a  
23 collateral attack, avoiding in this case the untenable  
24 choice between letting a claim expire or filing the civil  
25 suit against a person who is involved in prosecuting him.

1           And so I think that the same concerns that  
2     animate McDonough require a finding that the Manuel claim  
3     did not actually accrue until the proceedings were  
4     terminated in my client's favor.

5           THE COURT: So you're saying the claim is that  
6     the false arrest or detention was based on the fact that  
7     at that point they knew about this other confession and  
8     therefore, had no probable cause to arrest?

9           MS. HORN: Your Honor, to be clear, we're not  
10    claiming false arrest. So we're simply --

11          THE COURT: Or detention for how long?

12          MS. HORN: It's a seven-month pretrial detention  
13    from the time he was held over pursuant to legal process  
14    until the time of his trial. That's the time that Manuel  
15    covers.

16          THE COURT: But then what's your theory on at  
17    what point in that they may have understood that they had  
18    no basis to hold him?

19          MS. HORN: Your Honor, I mean I believe our  
20    theory that there was no probable cause -- I mean we don't  
21    have a false arrest claim because that is time barred.  
22    But our position is there was no probable cause. They  
23    knew who the real perpetrator was and that the evidence  
24    that they generated to pin the crime on my 16-year-old  
25    client was either fabricated or was the evidence that he

1 needed to prove his innocence was withheld from him.

2 And so what we're alleging is the same evidence  
3 that was used to hold him over for trial is the same  
4 evidence that was presented at trial. And therefore, he  
5 could not have brought his claim until the proceedings  
6 completely terminated in his favor.

7 THE COURT: I'm still trying to understand  
8 whether this is the same or different than a standard Heck  
9 argument. Did the court rely on anything that -- I mean  
10 normally what you're looking at is, for example, a  
11 suppression issue whether there's evidence that the or  
12 there's -- you're going to challenge a search or something  
13 like that and that the underlying search was basically  
14 upheld in the criminal proceedings. So you would be  
15 contradicting effectively the court's ruling unless the  
16 conviction is vacated and so forth. So you are not making  
17 that argument.

18 MS. HORN: No, Your Honor.

19 THE COURT: Or you're just saying the evidence  
20 is the same --

21 MS. HORN: well, the evidence --

22 THE COURT: -- and therefore -- finish it for  
23 me.

24 MS. HORN: No. I didn't want to interrupt you.

25 THE COURT: Yes.

1 MS. HORN: The evidence that was used -- the  
2 evidence that was generated during the investigation, the  
3 statements of the witnesses, the statements of the real  
4 perpetrator that was withheld from him, that's the same  
5 evidence that was used at trial.

6 For example, Mr. Burgess, the victim, testifies  
7 at trial that my client did it. That's the same evidence  
8 that was created during the criminal investigation.

9 And so our claim is essentially that if you  
10 required our client to bring this claim either at the time  
11 of his, you know, original detention or I think I heard  
12 counsel offer at the time that he was released from  
13 custody, his claim would be an unlawful detention without  
14 probable cause and the allegation would be they had no  
15 probable cause because they knew who the real perpetrator  
16 was and the remainder of the evidence that pointed towards  
17 my client was fabricated. That would be what he would  
18 have to prove in his Manuel claim. That's the same thing  
19 that he would have to prove to prove, for example, his due  
20 process claim which there is no dispute --

21 THE COURT: So do you have a case that spins out  
22 this theory -- I know that the McDonough case is new. So  
23 maybe it doesn't exist yet. But anything else you can  
24 point to?

25 MS. HORN: I don't have a case on point, Your

1 Honor. We believe that McDonough applies via analogy and  
2 the Supreme Court did decline to address the statute of  
3 limitations when it heard Manuel.

4 THE COURT: Okay. Well, anything else you'd  
5 like to add on any other theory?

6 MS. HORN: No, Your Honor.

7 THE COURT: Okay. So I believe the defendants  
8 had more time than the plaintiffs did. So to the extent  
9 there's any rebuttal, let's make it one or two points if  
10 any and only on things that were raised by Ms. Horn.

11 MR. DAHL: Just a moment, Your Honor.

12 THE COURT: Yes.

13 (Pause.)

14 MR. DAHL: Thank you, Your Honor. I'd like to  
15 speak first to Ms. Horn's characterization of the circuit  
16 court's acceptance of the document. Ms. Horn argued that  
17 it was irrelevant for Mr. Parks at that time to argue who  
18 had withheld the document and further challenge acceptance  
19 by the court based on the proffer made by Assistant  
20 State's Attorney Tony Gioia during his presentation to the  
21 court at the hearing.

22 THE COURT: So as part of that, can you tell me  
23 whether you agree or disagree with her assertion that  
24 there was no actual finding as to who -- what had actually  
25 happened with this document, whether the prosecutor had

1 withheld it, whether the police had done anything wrong,  
2 that it didn't get to that level of detail. Is that  
3 correct or not?

4 MR. DAHL: I would disagree, Your Honor. I  
5 think implicitly, strongly implicitly and necessarily --

6 THE COURT: Not implicitly. Like where is it in  
7 the record that the court either wrote down or said I'm  
8 finding that this was all the prosecutor's fault or  
9 something to that effect?

10 MR. DAHL: The court opened its order with upon  
11 consideration of the petition for writ and the court would  
12 have had to have made findings as to two elements, two  
13 elements of the petition for writ of actual innocence --

14 THE COURT: So the answer is no. It's not  
15 written down. It's by inference.

16 MR. DAHL: It was necessary because there were  
17 only facts as to the second element that related to the  
18 prosecutor withholding --

19 THE COURT: What was the second element again?

20 MR. DAHL: The second element under 8-301(a)(2)  
21 of the petition for writ of actual innocence statute is  
22 that the evidence could not have been discovered in time  
23 to move for new trial under Maryland Rule 4-331. Thus  
24 notwithstanding Mr. Gioia's, you know, alternative  
25 presentation or concession as to whether the document

1 could have led to a substantial or significant possibility  
2 that the result may have been different.

3 The only facts before the court, because the  
4 only facts that Mr. Parks put before the court was that  
5 the prosecutor withheld the document in court; that is why  
6 I could not have moved for a new trial earlier.

7 THE COURT: So the argument though was it was  
8 not in the prosecutor's file. Is that correct factually?

9 MR. DAHL: The argument factually was that it  
10 was not turned over to the defense because the prosecutor  
11 withheld it. That was the argument that Mr. Parks made  
12 before the Circuit Court for Baltimore City and it's the  
13 only one that he made before the Circuit Court for  
14 Baltimore City.

15 THE COURT: Okay.

16 MR. DAHL: And it must have been accepted by --  
17 for the court or else the court just let someone out of  
18 prison, a convicted murderer serving 80 years because the  
19 Assistant State's Attorney said we don't have a problem  
20 with this. The Assistant State's Attorney doesn't have  
21 pardon power. It doesn't have the power to grant  
22 reprieves. The court had to look at the document and the  
23 order says I looked at the document upon consideration of  
24 the petition --

25 THE COURT: Okay. I understand the argument.



1 MR. DAHL: Okay. And then secondly, might  
2 follow the Court's instruction to leave it to two points.  
3 Ms. Horn argued that this Court alternatively might grant  
4 leave to amend on conspiracy so that she could replead  
5 that the prosecutors -- the prosecutor and the police were  
6 in it together. On that, I would simply cite *Evans v.*  
7 *Chalmers*, 703 F.3d. 636, pin cite 649, year 2012. This is  
8 another case where it was alleged based on a bad  
9 prosecutor who was disbarred for his actions in the case  
10 that the police and the prosecutor acted on it together to  
11 fabricate and conceal evidence and the Fourth Circuit said  
12 no, this is not possible. "It is contrary to the purpose  
13 of qualified immunity to extend personal liability to  
14 police officers who have assertedly conspired with, but  
15 neither misled nor unduly pressured the prosecutor."  
16 Concluding "thus, we hold today that an alleged officer or  
17 prosecutor conspiracy does not alter the rule that a  
18 prosecutor's independent decision to seek an indictment  
19 breaks the causal chain unless the officer has misled or  
20 unduly pressured the prosecutor." But because of the  
21 Fourth Circuit's recent holding on this very issue, we  
22 would say that on the conspiracy counts, Ms. Horn's  
23 request for leave to amend would be futile.

24 THE COURT: Okay.

25 MR. DAHL: And thank you --

1 THE COURT: Thank you.

2 MR. DAHL: -- for your consideration, Your  
3 Honor.

4 THE COURT: Ms. Lynch, anything?

5 MS. LYNCH: Just a few small points, Your Honor.

6 THE COURT: Well, Mr. Dahl was gracious enough  
7 to keep it to two. Even though I had said one or two, but  
8 he read that broadly.

9 MS. LYNCH: Thank you, Your Honor. Turning  
10 first to the Eleventh Amendment immunity argument, Your  
11 Honor asked a lot of questions about subject matter  
12 jurisdiction and the standard of review there. There's  
13 another case where the Fourth Circuit has been unclear on  
14 whether a dismissal of Eleventh Amendment grounds is a  
15 dismissal for failure to state a claim under 12(b)(6) or  
16 lack of subject matter jurisdiction under 12(b)(1).

17 THE COURT: Is this Hutto?

18 MS. LYNCH: This is Andrews v. Daw, which is 201  
19 F.3d. 521 (Fourth Circuit 2000). However --

20 THE COURT: My understanding from Hutto, which  
21 is 2014 is that it isn't a hundred percent crystal clear,  
22 but the Fourth Circuit has said it's not a hundred percent  
23 crystal clear, but they are treating it as something  
24 that's effectively an affirmative defense and so I read  
25 that as meaning they're not finding it's subject matter

1 jurisdiction, even though they've had that opportunity.  
2 So it sounds like this is consistent with that. You're  
3 saying that it's saying that it's unclear.

4 MS. LYNCH: That it's unclear. However --

5 THE COURT: Which is different than what you  
6 said before which is --

7 MS. LYNCH: I think that the 2018 case which  
8 I've cited --

9 THE COURT: Which has nothing to do with  
10 sovereign immunity. Cunningham?

11 MS. LYNCH: Yes.

12 THE COURT: I mean nothing to do with the  
13 Eleventh Amendment.

14 MS. LYNCH: It does have to do with sovereign  
15 immunity and --

16 THE COURT: Nothing to do with the Eleventh  
17 Amendment though. Right?

18 MS. LYNCH: Well, it was not decided on the  
19 Eleventh Amendment immunity grounds, but it was sovereign  
20 immunity and --

21 THE COURT: The defendant was -- are you talking  
22 about Cunningham or the unpublished district court case?

23 MS. LYNCH: The General Dynamics versus  
24 Cunningham. However, the Fourth Circuit in --

25 THE COURT: Where in this does the Eleventh

1 Amendment even come up? Is there a state defendant in  
2 this or -- I guess I'm missing it. Again I admit that I  
3 hadn't read the case because I didn't think it was  
4 relevant. But in just in looking at it, I don't see where  
5 the State is even a party.

6 MS. LYNCH: Well, to the extent, Your Honor,  
7 that it would be a 12(b)(6) or a 12(b)(1) motion in Roche  
8 versus West Virginia Regional Authority --

9 THE COURT: Maybe we don't need to discuss this  
10 because I don't think the analysis is going to be any  
11 different whether it's subject matter jurisdiction or not.

12 MS. LYNCH: Okay.

13 THE COURT: I just have a problem with attorneys  
14 coming in and saying this is jurisdictional, here's the  
15 case and then you cite a case that doesn't even mention  
16 the Eleventh Amendment and they are very different.

17 MS. LYNCH: Your Honor, I --

18 THE COURT: And I just have a problem with that.

19 MS. LYNCH: Okay.

20 THE COURT: But again I don't think it's going  
21 to affect the decision because I think the analysis is  
22 basically the same. But, you know, the Supreme Court  
23 recently said I think in Davis in a different context that  
24 jurisdiction is not a word to be thrown around lightly in  
25 ruling on Title VII issues. And lawyers do that all the

1 time. They come in here and say this is subject matter  
2 jurisdiction, this is subject matter jurisdiction. And  
3 when it's not, I find that misleading. So why don't you  
4 move on to the next issue?

5 MS. LYNCH: Sure. In order for the Court to  
6 find that there is Eleventh Amendment immunity, the public  
7 local laws really explain that. That the general assembly  
8 established -- the commissioner is the State for purposes  
9 of this analysis. He takes the same oath that other state  
10 officials take under the Maryland constitution. The  
11 public local laws do not delegate the authority of this  
12 State to any other -- to the city or to anyone else. In  
13 fact in Public Local Law Section 16(2)(b), the Baltimore  
14 Police Department is given powers to exercise its police  
15 powers outside of the city in areas that the Baltimore  
16 Police Department owns -- I'm sorry -- that Baltimore City  
17 owns.

18 As far as the plaintiff said that there's some  
19 inconsistency in how the police department is classified  
20 as to state law and I think that that is just not true.  
21 There is a chance to make -- and the Court can take  
22 judicial notice of this fact -- there's a chance to make  
23 the Baltimore Police Department a city agency. There was  
24 a bill put forward and it was rejected.

25 The fact that the Supreme Court has called the

1 protection of the State's sovereign dignity as a paramount  
2 concern, I think -- although all of the factors must be  
3 given, you know, no one factor is given preeminence, I  
4 think that leads to the conclusion that the State's  
5 classification of the BPD as a state agency is highly  
6 relevant.

7 As to the Monell argument, Owens doesn't say  
8 that pleading Monell is easy. It says that proving it is  
9 difficult, but pleading it by definition is easier. This  
10 case is different from Owens. We're still on the  
11 complaint. It can't be that just because a cause of  
12 action was made out in Owens, it would be here. We still  
13 need to look at the pleadings filed in this case to see if  
14 they meet the Iqbal Twombly standard.

15 Also in Owens, that was a different type and  
16 this goes back to the Connick v. Thompson case. It was a  
17 different type of violation. It was inconsistent witness  
18 statements I believe. That isn't an issue in this case  
19 which is things like burying guns, destroying evidence,  
20 fabricating a false narrative and all that type of thing.  
21 Unless Your Honor has any other questions, I would submit  
22 on the papers.

23 THE COURT: Thank you.

24 MS. LYNCH: Thank you.

25 THE COURT: So we went a lot longer than I

1 thought we would, although that doesn't sound unusual.  
2 Let's take a brief ten-minute recess. I may be able to  
3 give you some guidance on where we stand now. We may then  
4 talk about the recent letter filed. Thank you.

5 (Recess.)

6 THE COURT: I know this motion has been pending  
7 for quite some time and that's not ideal for the life of a  
8 case. It is the reality of the competing cases that we  
9 need to focus on. But we are addressing it now. I do in  
10 part because of that, but also because I believe that all  
11 the important issues have been resolved based on the  
12 papers and the argument. I am prepared to rule on the  
13 motion to dismiss now.

14 First, on the issue or as a threshold issue,  
15 there were a large volume of materials attached to the  
16 motions and ordinarily on a motion to dismiss, I don't  
17 consider outside materials. There are some exceptions to  
18 that rule. And in this case, I will consider the Petition  
19 for writ of Actual Innocence and based on judicial notice  
20 because it's another court proceeding. I will also  
21 consider the Local Government Tort Claims Act Notice which  
22 was at least largely referenced in the complaint. I find  
23 that to be integral to the complaint. Otherwise, I will  
24 not be considering other attachments submitted under Rule  
25 12(d) which prevents me from doing that except if the

1 motions turn into a motion for summary judgment.

2 As a threshold issue because the claims of the  
3 City, Baltimore City Police Department are interspersed  
4 throughout the issues here, I want to discuss the Eleventh  
5 Amendment immunity issue. The Baltimore City Police  
6 Department asserted that as an agency of the state, it is  
7 immune to suit under Section 1983 based on the Eleventh  
8 Amendment. Although there was some discussion about this,  
9 the Court finds that under Hutto versus South Carolina  
10 Retirement Systems, 773 F.3rd. 536, (Fourth Circuit 2014),  
11 that this is not a subject matter jurisdiction issue.  
12 Sovereign immunity under that case is in the nature of an  
13 affirmative defense. So the police department has the  
14 burden of demonstrating it. And as has been said, I don't  
15 think either the Fourth Circuit or other courts have been  
16 completely explicit on this issue. But in Hutto, the  
17 Fourth Circuit does note that this is not something that  
18 they have found as subject matter jurisdiction. So I will  
19 not so find.

20 I will note as we've discussed, I don't think it  
21 makes any difference to the analysis. It may have made a  
22 difference on whether I should be considering it at this  
23 point, but I think in the interest of judicial economy for  
24 later purposes, I will consider it now.

25 And so under either subject matter jurisdiction



1 or under Rule 12(b)(6), I think the analysis will largely  
2 be the same.

3 Under *Ram Ditta versus Maryland National Capital*  
4 *Park and Planning Commission*, 822 F.2d. 456 (Fourth  
5 Circuit 1987) whether an entity is entitled to Eleventh  
6 Amendment immunity is a question of federal, not state  
7 law. In *Ram Ditta*, the Fourth Circuit set out factors for  
8 this analysis. The first and most important was whether  
9 the state treasury would be responsible for paying the  
10 judgment. Under *Harter versus Vernon*, 101 F.3rd. 334  
11 (Fourth Circuit 1996), that factor is generally  
12 determinative. Additional factors include whether the  
13 entity exercises a significant degree of autonomy from the  
14 state, whether it is involved with local rather than the  
15 statewide concerns and how it is treated as a matter of  
16 state law. To the extent that the importance or  
17 significance of any of those factors may have been  
18 adjusted or arguably could be adjusted over the course of  
19 time, I will look at them all without giving primacy to  
20 any particular factor.

21 Based on a consideration of those factors, I  
22 conclude that the Baltimore City Police Department is not  
23 entitled to Eleventh Amendment immunity to suit under  
24 Section 1983. The reasoning is very similar to what was  
25 set forth in *Alderman versus Baltimore City Police*

1 Department, 952 F. Supp. 256 (District of Maryland 1997).  
2 The court notes that here as in Alderman, the Baltimore  
3 City Police Department had provided no evidence  
4 establishing that the state, not Baltimore City, would be  
5 responsible for paying any potential judgment and the  
6 Baltimore City effectively conceded that point and  
7 Baltimore City Police Department also has significant  
8 autonomy from the State with control primarily coming from  
9 Baltimore City which appoints the police commissioner.  
10 Baltimore City Police Department's functions are local  
11 primarily, not statewide. I don't find persuasive the  
12 arguments that there may be some stray areas where there's  
13 some jurisdiction beyond the city limits or that they  
14 enforce state laws.

15           The only factor that weighs in favor of immunity  
16 is that pursuant to Mayor and City Council of Baltimore  
17 versus Clark, 944 A.2d. 1122 from the Court of Maryland  
18 2008, the State of Maryland does view the Baltimore City  
19 Police Department as a state entity based on Maryland  
20 statutes for purposes of immunity from state law torts,  
21 but that does not apply to federal constitutional claims.

22           In looking at all these factors together under  
23 any weighting of these particular factors, that  
24 designation does not outweigh the other factors,  
25 particularly the payment of the judgment, the lack of

1 statewide impact of the department and the issue of  
2 control by either the state or city or autonomous control.

3 Notably, the Maryland Court of Appeals  
4 specifically stated in the context of Section 1983 that  
5 the classification of BCPD as a state agency is not  
6 controlling. It said that in *Clea v. City of Baltimore*,  
7 541 A.2d. 1303 (1988). Also I would note that in *Blades*  
8 *versus Woods*, 667 A 2nd. 917, the Court of Special Appeals  
9 expressly held that whatever state immunities Baltimore  
10 City Police Department may have, they do not extend to  
11 suits under 1983.

12 As a result, courts that have considered this  
13 distinction since *Clark* have reaffirmed the finding that  
14 Baltimore City Police Department is not subject to  
15 Eleventh Amendment immunity including *Rockwell versus*  
16 *Mayor and City Council of Baltimore*, 2014 Westlaw 949859  
17 from 2014. The cases that have referenced otherwise as  
18 stated do not go through the four-part analysis that we've  
19 discussed. So the Court, therefore, concludes that as has  
20 been the case for many years, the Baltimore City Police  
21 Department does not have Eleventh Amendment immunity from  
22 suit. So we will consider the claims made by both  
23 defendants regarding the motion.

24 On the issue of statute of limitations, the  
25 defendants have acknowledged now or have conceded that

1 their position changes as a result of McDonough versus  
2 Smith, the recent Supreme Court case from June of 2019.  
3 So they are no longer arguing that Counts One and Two are  
4 subject to dismissal based on the statute of limitations.  
5 They do argue Counts Three, Four and Nine should still be  
6 subject to dismissal.

7           With respect to Count Three, the detention  
8 without probable cause, the plaintiffs have argued that  
9 McDonough still can be construed as applying to that case  
10 and extending the date of which the statute of limitations  
11 begins to run to the same date that would apply for Counts  
12 One and Two. I don't find that reasoning to be laid out  
13 in McDonough. McDonough does distinguish in talking about  
14 Wallace versus Kato, 549 U.S. 384 (2007), a distinction  
15 between false arrest claims such as in Wallace and  
16 malicious prosecution claims as in McDonough. And in this  
17 instance, the detention claim although perhaps expounded  
18 upon by the plaintiff beyond what's actually written in  
19 the complaint is much closer to a false arrest claim than  
20 it is to a malicious prosecution claim. It focuses on the  
21 period of detention. It is not focused on the actual  
22 prosecution of the case. And so the Court finds that it  
23 is still governed by Wallace. That the claim becomes ripe  
24 as soon as the individual is held pursuant to process  
25 here. Mr. Parks was arrested in 1999, proceeded to trial

1 in 2000. So he was held pursuant to process beginning in  
2 2000. And therefore, his claim in 2018 was untimely. So  
3 Count Three will be dismissed based on the statute of  
4 limitations.

5 Counts Four and Nine are a different analysis.  
6 In Count Four, a Section 1983 claim for failure to  
7 intervene, in *Randall versus Prince George's County*, 302  
8 F.3rd 188 (Fourth Circuit 2002), the Fourth Circuit  
9 equated bystander liability, another term for failure to  
10 intervene to have parallels to accomplice liability. The  
11 Court accordingly finds that a failure to intervene claim  
12 accrues at the same time as the primary tort in which the  
13 bystander defendants allegedly fail to intervene, which in  
14 this case is the malicious prosecution claims which  
15 accrued on October 9, 2015.

16 So along the lines of how the Court would have  
17 analyzed that claim before *McDonough* or certainly after  
18 *McDonough*, I find that the failure to intervene claim  
19 follows the same track and is timely at least as pleaded.  
20 So the motion is denied as to Count Four.

21 On Count Nine, the officer defendants move to  
22 dismiss the or both sides -- both sets of defendants move  
23 to dismiss the intentional infliction of emotional  
24 distress claim. Under *Parish versus City of Elkhart*, 614  
25 F.3rd 677 (Seventh Circuit 2010), which is relied on in

1 Prince George's County versus Longtin, 19 A.3d. 859  
2 (Maryland 2011), a court should determine the date when an  
3 intentional infliction of emotional distress claim accrues  
4 by looking at the crux of the claim. As in Parish, the  
5 crux of the claim here is a wrongful conviction based on  
6 withheld exculpatory evidence such that the tort was not  
7 completed prior to the conviction.

8 Accordingly, the claim could not have been  
9 brought by Mr. Parks before his conviction and the  
10 possibility of future prosecution being disposed of  
11 favorably along the same lines as the reasoning on Counts  
12 One, Two and Four at least. And so again the Court finds  
13 the date of accrual to be October 9, 2015 and the motion  
14 is denied on Count Nine.

15 As for the judicial estoppel argument, the  
16 officer defendants are arguing that Mr. Parks should be  
17 judicially estopped from proceeding in whole or in part on  
18 the allegations relating to the withholding of the Mueller  
19 report because his Petition for Writ of Actual Innocence  
20 or in that petition, he expressly asserted that the  
21 Mueller report was withheld by the prosecutors, not by  
22 police officers. Under Zinkand versus Brown, 478 F.3d.  
23 634 (Fourth Circuit 2007), judicial estoppel applies when  
24 three criterion are met. A party adopts a factual  
25 position inconsistent with the stance taken in prior

1 litigation, the inconsistent factual position is accepted  
2 by the court and the party intentionally misled the court  
3 to gain an unfair advantage. The last criterion is  
4 particularly important because as the Fourth Circuit made  
5 clear in Zinkand without bad faith, there can be no  
6 judicial estoppel.

7 Here, the Court finds that even assuming that  
8 the first two prongs were met, there are not the necessary  
9 indicia of bad faith to dismiss these claims at this stage  
10 of this case. Mr. Parks' essential contention remains  
11 consistent that there was material exculpatory evidence  
12 that was withheld from him resulting in his unjust  
13 conviction and incarceration.

14 It would not necessarily matter for purposes of  
15 the petition whether the prosecutor or the police officers  
16 were responsible factually for the ultimate withholding of  
17 the exculpatory report. So he did not gain any particular  
18 unfair advantage in that prior proceeding by using the  
19 factual approach regarding the prosecutor.

20 The inconsistency could be based on a number of  
21 factors, including whether or not the -- whatever might  
22 appear to be the argument that is at least most prevalent  
23 in the facts or most likely to succeed in gaining  
24 Mr. Parks' release, but that does not necessarily  
25 establish based on the pleadings that there was bad faith

1 or is bad faith in the use of the factual argument that's  
2 being made here. Notably, the petition itself did not  
3 characterize the police officer's role as innocent or  
4 completely unrelated to the alleged misconduct.

5 So under the circumstances at the pleading  
6 stage, I do find that there is no basis to conclude as a  
7 matter of law that there was bad faith and so the Court  
8 will not dismiss the complaint based upon judicial  
9 estoppel.

10 There was in the motion, although we didn't  
11 discuss it today, claims regarding qualified immunity.  
12 The officer defendants moved to have all of the claims  
13 dismissed on that basis. As the brief makes clear, the  
14 argument for qualified immunity hinges on the Court's  
15 finding that Mr. Parks was judicially estopped from  
16 arguing that they had withheld the Mueller report from the  
17 prosecutor. But where the Court has found no estoppel on  
18 this point, the qualified immunity argument can't succeed  
19 at this point because under Taylor versus Waters, 81  
20 F.3rd. 429-436 (Fourth Circuit 1996), it was already  
21 established that a police officer who withheld exculpatory  
22 evidence from the prosecutor and therefore, deprived the  
23 defendant of a fair trial had violated due process rights.

24 The determination as to qualified immunity is  
25 made without prejudice as discovery may reveal facts



1 establishing that the police officers fulfilled the  
2 clearly established disclosure obligations of which they  
3 had reasonable notice. But the motion will be denied at  
4 this point.

5 On the issue of Local Government Tort Claims  
6 Act, the officer defendants move to have all of the  
7 claims -- state laws claims dismissed for failure to  
8 strictly or substantially comply with that statute. Under  
9 Section 5-304(b)(2) of the act, a plaintiff must give  
10 notice and writing of a potential tort claim by stating  
11 the time, place and cause of the injury. The notice must  
12 be given within one year of the injury. Here, the  
13 complaint alleges and the attached document shows that a  
14 letter was sent to the City Solicitor for Baltimore City  
15 in June of 2015 that summarized the wrongful prosecution  
16 and subsequent incarceration, which the Court finds  
17 constitutes the necessary notice under the statute.

18 The argument that the notice was provided before  
19 the injuries actually occurred or at least as a legal  
20 matter were ripe does not change the result. The point of  
21 the one-year requirement is to enable local governments to  
22 conduct their own investigations into tort claims while  
23 the evidence is still fresh.

24 Here, the underlying facts had already occurred.  
25 The Court, therefore, rejects the officer defendants'

1 argument that Mr. Parks' notice was untimely because it  
2 was premature. It was in keeping with the goals of the  
3 statute and therefore, the Court finds that even if it was  
4 deemed not strict compliance, it was substantial  
5 compliance which is permissible under Faulk versus Ewing,  
6 808 A.2d. 1262 (Maryland 2002).

7 Also in terms of the content, this two or  
8 three-page document, whether it mentions each individual  
9 defendant or not, the Court finds does satisfy the  
10 requirements of the particular statute.

11 On the broader arguments under 12(b)(6), first  
12 with respect to the individual officers' claims about  
13 improper group pleading, the Court will deny the motion on  
14 that issue for reasons similar to those in Burgess versus  
15 Baltimore City -- Baltimore Police Department, 2016  
16 Westlaw 795975 (District of Maryland 2016). Mr. Parks has  
17 not yet had access to discovery. So he is not in a  
18 position to know what role various officers played in the  
19 investigation into the murder for which he was convicted.  
20 That is particularly true where the record shows some  
21 level of evidence withholding potentially or problems with  
22 record keeping and so the Court finds the allegations  
23 sufficiently precise to proceed to the next step of this  
24 case.

25 On the issue of the Moneil allegations, there

1 are various theories under which this would proceed. The  
2 Court focuses though on the issue of whether there was  
3 sufficient facts alleged to establish a widespread  
4 practice of withholding evidence or fabricating evidence.

5 As another judge in this court found in Smith  
6 versus Baltimore City Police Department, 2014 westlaw  
7 12675230 (2014), pre-discovery, the numerous accounts of  
8 similar behavior are sufficient to establish a plausible  
9 inference of Monell liability under the pleading standard  
10 under the custom or widespread practice theory,  
11 particularly when included with the allegations based on  
12 the Tabeing Report. These series of prior incidents are  
13 based on facts occurring in the same timeframe including  
14 before this particular incident here. The report also  
15 refers to that as well. And so under 12(b)(6), the Monell  
16 claim is sufficiently pleaded.

17 However, the Court will find that the federal  
18 and state law conspiracy claims are barred by the  
19 intracorporate conspiracy doctrine, which dictates that  
20 officers and employees of the same entity acting in an  
21 authorized manner do not constitute separate actors for  
22 purposes of establishing a conspiracy.

23 The plaintiff doesn't seriously dispute that  
24 concept, but argues instead that the prosecutor could be  
25 deemed to be -- has been alleged to be a member of a

1 wider, extra corporate conspiracy. But in the complaint,  
2 the allegations are simply that the conspiracy extends to  
3 other individuals known and unknown within and without the  
4 BPD.

5 The argument now is that that includes or  
6 focuses on the prosecutor. For one thing, it's not in the  
7 complaint. But and therefore, that in and of itself is a  
8 reason to dismiss those claims. But the Court notes also  
9 that where Mr. Parks' more recent theory of prosecutorial  
10 involvement is in tension with this or even contrary to  
11 this theory, the lack of any particular allegations to  
12 spell this theory out, lead to the conclusion that the  
13 allegations do not support an inference of conspiracy  
14 outside the police department even if one were arguing it  
15 in the alternative.

16 To the extent that discovery may reveal facts  
17 that renders a conspiracy allegation viable, the complaint  
18 can be amended at that point. But for now, the Court will  
19 dismiss the federal and state conspiracy claims.

20 Finally, on the issue of the indemnification  
21 claim in Count Twelve because some of the claims against  
22 the officer defendants remain viable, the issue is simply  
23 this argument that was raised by the defendants, A, that  
24 there might be sovereign immunity, also that there -- it  
25 may be premature to make this assertion at this point.

1 First off, the waiver of immunity or the state sovereign  
2 immunity is effectively waived for claims to -- of a duty  
3 to defend or indemnify an employee under Baltimore Police  
4 Department versus Cherkes, which is 780 A.2nd. 410.

5 And then in terms of whether we are now at the  
6 point where this can be alleged, the Court disagrees with  
7 the analysis offered regarding Johnson versus Francis, 197  
8 A.3rd. 582, (Maryland Court of Special Appeals 2018).

9 That case does make clear that the Court rejects the theory  
10 that the officer must assign the claim before a plaintiff  
11 can pursue a claim against the department directly.

12 Rather the case focuses on the notion that a plaintiff  
13 must be able to recover from a local government without  
14 the need to first obtaining an assignment from the  
15 employee who wronged him or her. And so the Court does  
16 not accept the notion that there are predicates to an  
17 indemnification claim that have yet to occur or have to  
18 have been asserted obviously. Again, evidence must be  
19 established to lay out all of the different pieces that  
20 would lead to an indemnification claim. But the Court  
21 will deny the motion on Count Twelve.

22 I believe that covers all the issues in the  
23 motions. There will be an order issued that memorializes  
24 the various rulings on these various counts.

25 Ordinarily, we would move then to standard

1 discovery. But we also have this letter that was  
2 submitted on August 30th seeking to file a motion to  
3 dismiss as a litigation sanction based on fabrication.

4 And I guess the question that I wanted to ask  
5 was to the extent that this would be a basis to dismiss or  
6 impose some other sanction, it seems as if it's a  
7 fact-based issue that focuses on things such as whether a  
8 document was fabricated, there's proffers that there's  
9 expert testimony that would establish these facts. How  
10 does one dismiss a case that has a fact-based argument  
11 until we develop the facts?

12 So let me ask whoever from the defense side  
13 wants to raise this issue. I certainly have no problem  
14 with the idea of trying to proffer a theory, but is this  
15 the right time at this point?

16 MR. NATHAN: Your Honor, would you like me to  
17 address the Court from the --

18 THE COURT: Maybe, yes, because the -- either  
19 that or pull the microphone closer.

20 MR. NATHAN: Good morning. To address your  
21 question directly, I think there is some limited fact  
22 discovery that does need to be -- does need to take place  
23 and the parties have conferred after we sent the letter  
24 over to plaintiff.

25 If I may just give a brief introduction to what

1 we believe the motion is going to show. And we will be  
2 attaching factual support for that and we anticipate that  
3 the plaintiff will want to conduct some limited discovery  
4 on that issue and we are going to want to conduct some  
5 discovery on the issue as well.

6 As we heard this morning and the Court is well  
7 aware at this point, the complaint -- the plaintiff  
8 vacated his conviction primarily based on this Mueller  
9 report or exclusively based on this Mueller report. And  
10 that's well established from the petition for writ of  
11 innocence.

12 The plaintiff's complaint also strongly relies  
13 on this Mueller report in numerous places and we've talked  
14 about that this morning as well.

15 THE COURT: So I mean the process here and I  
16 understand only some but not all of the judges use the  
17 process where we've laid out here with the letter. Again  
18 I'm really more concerned with timing. This isn't an  
19 opportunity to argue the merits of this motion and I can  
20 obviously read the letter. So I know what the contours of  
21 it are. So again you've said that both sides want  
22 discovery on this. So why would you file a motion now  
23 until after that occurs?

24 MR. NATHAN: Because we think that this is an  
25 important enough issue that the Court should be made aware

1 of it, number one, and, number two, discovery should focus  
2 preliminarily in this case on this issue first.

3 These types of cases tend to explode into 30, 40  
4 depositions. That could happen. Thousands of pages of  
5 discovery which is extremely costly. And our strong  
6 belief here is that the Court is going to view the two  
7 experts that we have here as credible and that will be  
8 establishing that this entirety case is based on a forged  
9 document. And therefore --

10 THE COURT: That no one discovered during the  
11 motion to vacate?

12 MR. NATHAN: In this -- in state court?

13 THE COURT: Yeah. Again, I don't want to argue  
14 the merits of this. But it seems a little strange that  
15 you have a convicted murderer and the state has a  
16 detective who is accused of forging a -- of withholding a  
17 report and he's involved and no one comes out and says  
18 this must be a forgery? It seems somewhat incredible that  
19 the detective himself wouldn't have said I never wrote  
20 this.

21 MR. NATHAN: We were not a party to that  
22 proceeding, Your Honor.

23 THE COURT: Who is we?

24 MR. NATHAN: The defendant police officers is  
25 who I represent. But the Baltimore Police Department was



1 also not a defendant in that proceeding. However --

2 THE COURT: Was Detective Mueller involved in  
3 that in some way?

4 MR. NATHAN: Your Honor is referencing Officer  
5 Mueller.

6 THE COURT: Officer Mueller.

7 MR. NATHAN: And what I believe happened in that  
8 proceeding is that that report, the so-called Mueller  
9 report was presented to him and said is that your  
10 signature and he looked at it and he said I have no  
11 recollection of this document at all. And he's not a  
12 detective involved in the case. He just responded to the  
13 scene. So it's not -- he didn't have an intimate  
14 recollection of this event. He says yes, that looks like  
15 my signature and he maintains it looks like his signature  
16 and the expert --

17 THE COURT: But the whole time that this person  
18 is trying to get out of prison for this murder conviction,  
19 he never says, you know, I actually didn't interview this  
20 person or whathaveyou, the contents are not accurate  
21 whether I remember it or not. I mean that didn't come up?

22 MR. NATHAN: He did not testify and no, it  
23 didn't come up. He said he had no recollection of this at  
24 all. And he maintains that. But what we're saying is  
25 that it's not surprising at all that he would authenticate

1 his signature because it is in fact his signature --

2 THE COURT: Okay. Fine. I understand the  
3 point. So again what I'm concerned about is you want to  
4 file a motion with no discovery as you said. And why  
5 wouldn't we take the discovery first. It sounds like  
6 maybe what you're asking for is to sequence discovery in a  
7 particular way such that at some point when you have  
8 enough information on this issue, you could file a motion  
9 and perhaps head off some of the other parts of the  
10 case --

11 MR. NATHAN: whichever direction Your Honor  
12 prefers would be fine with us. Whether we should file the  
13 motion to focus the issue first and then we can focus  
14 discovery around that or I think we've already tendered  
15 our two expert reports to plaintiff and I think we can  
16 come up with a structured discovery without pre-filing the  
17 motion. That also I hear that as being a similarly  
18 efficient way to deal with it because scope of the issues  
19 may vary a little bit and then ripen for the Court. So I  
20 would be happy to proceed either way.

21 THE COURT: Okay. Let me hear from Ms. Horn.

22 MS. HORN: Thank you. Your Honor, I mean I'm  
23 not going to go into the merits of this other than to say  
24 that we vigorously contest any assertion that it's a  
25 fraud. What I will say is --

1 THE COURT: You would agree it sounds like that  
2 to the extent it's a factual issue, that discovery of some  
3 kind would be needed before we --

4 MS. HORN: Your Honor --

5 THE COURT: -- resolve this question?

6 MS. HORN: Absolutely. First of all, the expert  
7 reports that they did tender to us after we wrote to them  
8 and said, hey, why don't you guys at least try to confer  
9 with us, those expert reports were written in March of  
10 2019. why there is this sudden urgency six months later  
11 to come to court and say we've got to dismiss the whole  
12 case or alternatively, we need to structure discovery to  
13 address this issue is somewhat -- I don't understand it.

14 And to the extent that they're relying on expert  
15 reports, that's a matter of expert discovery. If they  
16 want to present to a jury that their experts to the extent  
17 that they pass the Daubert threshold are alleging that  
18 parts of this document are a fraud, so be it. But that's  
19 really an issue for expert discovery. And they can't  
20 leapfrog the ordinary way in which discovery proceeds  
21 simply by coming up with this motion.

22 I will say to the extent they want to structure  
23 discovery, I think what's going to end up happening is  
24 we're going to have fights over whether this discovery  
25 actually goes to this issue of fraud or whether it goes to

1 something bigger, you know, some other issue in the case.  
2 Just think about plaintiff's deposition. Are they only  
3 going to get to ask him questions about the particular  
4 fraud? Are they going to get to ask him questions more  
5 globally about what he was doing on July 16, 1999?

6 So I think the idea of structuring discovery is  
7 not well taken given the nature of what they are asking  
8 for. To the extent that they are relying on expert  
9 reports, we can address that during expert discovery  
10 and --

11 THE COURT: Well, let me ask you this, Ms. Horn.  
12 You would acknowledge at least that whether it's for some  
13 separate motion to dismiss the case or just for the case  
14 overall, if they want to make some argument or develop an  
15 argument that the document was forged in some way, that  
16 that's something they should be able to try to pursue in  
17 discovery. Correct?

18 MS. HORN: Absolutely, Your Honor. We're  
19 certainly not saying that they can't pursue this defense  
20 in discovery and it sounds like in particular in expert  
21 discovery.

22 What we're saying is that it doesn't make sense  
23 to structure discovery around this issue that they have  
24 come up with and alleged as an emergency. These expert  
25 reports were done in March of 2019. That was actually

1 during the briefing on the motions to dismiss if they  
2 thought that this was such an imperative issue to raise to  
3 the Court.

4 So I think we can take this issue up in  
5 discovery just as we would any other issue or defense that  
6 they want to raise.

7 THE COURT: Well, what I would like to do I  
8 think is -- as I said, ordinarily, we would talk very soon  
9 about a schedule and there's a standard schedule and the  
10 parties often want to adjust the schedule. It's not  
11 unusual for parties in certain cases to try to put some  
12 structure around the schedule. Sometimes there's  
13 threshold issues or otherwise. That's not an unusual  
14 issue.

15 The nature of this type of case is such that as  
16 has been said, the discovery may be somewhat extensive.  
17 But that cuts both ways. On the one hand, some can be  
18 avoided if there's a reason to just pull the plug on the  
19 case overall. At the same time, if there is no reason,  
20 then that will just extend the life of the case for a  
21 very, very long time on a case where the facts are already  
22 quite old to start with.

23 And so what I would propose is that we -- first  
24 off, I don't see any reason or I don't see how this motion  
25 is even ripe until we know what the facts are and both

1 sides seem to agree that there is some need for discovery  
2 for that. So I would ask that the motion not be filed  
3 until after sufficient discovery has been had, that both  
4 sides recognize that this issue can be teed up.

5 I don't conclude that it has to wait until  
6 trial. There may be a reason once enough information has  
7 been developed for a motion of some kind to be filed along  
8 these lines. But I also don't want to hold up the rest of  
9 the case over that. So what I would suggest is we move  
10 into discovery, this be one of the issues that's the  
11 subject of discovery. And when enough information has  
12 been developed on this issue that both sides feel that it  
13 can be properly litigated, even if the plaintiff's  
14 position is that it should wait until the trial, I think  
15 certainly you can renew the letter at some point once you  
16 have what you need to prove this issue if you think you  
17 can prove it and then we'll set a schedule for that at  
18 that point.

19 Now Ms. Horn points out the significant  
20 likelihood that the parties would be fighting it out over  
21 what's the sequence of discovery. That naturally, the  
22 defendants would want to focus only on these issues first  
23 even if it's not ordered by the Court. But just as a  
24 practical matter, there is limited band width and both  
25 sides want to focus on what they care about the most and

1 the plaintiffs will probably try to resist that. So I see  
2 that as a potential problem.

3 I would ask the parties though to meet and  
4 confer and try to develop a schedule that would  
5 accommodate the potential for this issue to be addressed  
6 separately before trial. And so I think what that would  
7 mean is that discovery on these issues should not be put  
8 to the end. They should be handled relatively early in  
9 the process. But at the same time, there needs to be some  
10 accommodation for the fact that this is an old case  
11 factually even if it's only been filed a year ago and that  
12 other aspects of discovery need to move forward. And so  
13 making sure that both tracks are fairly being pursued, I  
14 think is the appropriate way to go.

15 Obviously, if there are expansive times  
16 consuming parts of discovery that the parties can agree  
17 should wait until the end which would normally be the case  
18 in almost any case regardless of this issue, that might be  
19 a way to help determine what happens earlier. But I think  
20 we should proceed on both fronts with the understanding  
21 that at some point if the facts break out the way that the  
22 defendants want to, that they would then potentially file  
23 a motion before we get to the end of discovery if -- or  
24 all discovery, ideally at the end of discovery on this  
25 issue to make the arguments they want to make.

1 MR. NATHAN: Your Honor, may I respond?

2 THE COURT: Yes. Just pull the microphone  
3 closer to you.

4 MR. NATHAN: If it's okay, I'm just going to  
5 stand here.

6 First, just to address that not charge of delay,  
7 but that comment of the delay. The reports were from  
8 March. As Your Honor can imagine, when we first saw the  
9 case, this was an issue we looked at and you noted that  
10 right away. You said didn't anyone look at that and  
11 that's exactly what happened when we said this. Let's  
12 look -- when we first saw the case, we said let's look at  
13 these documents.

14 At the same time, it's a serious allegation to  
15 be making. We understand that and we wanted to fully vet  
16 it. And we were preparing to file a motion today or  
17 tomorrow. And we remain prepared to file that motion and  
18 we needed to include other evidence in order to establish  
19 the basis for that motion. We anticipated that some  
20 discovery may be necessary and that's why we shared the  
21 reports with counsel and wanted to discuss with them what  
22 type of discovery would be necessary for the Court to  
23 fully understand the entire picture in order to make a  
24 ruling. Given --

25 THE COURT: Wouldn't this likely require some



1 live testimony? If you're really going to get the case  
2 dismissed, am I really going to just decide based on a  
3 written report without live testimony from experts and  
4 perhaps contemporaneous witnesses to these events?

5 MR. NATHAN: You're correct, Your Honor. The  
6 way that we wanted to proceed and I think we should  
7 proceed is we should file our motion which we've prepared  
8 for and that will lay out the scope of our allegations  
9 relating to this document.

10 We can listen to the plaintiff's experts to  
11 rebut that. We can have maybe one or two interrogatories  
12 or requests for production relating to these issues alone.  
13 Maybe -- we could discuss whether this is necessary --  
14 maybe a 30-minute to 45-minute deposition of the plaintiff  
15 relating to only this issue and the Court after seeing the  
16 briefing and the attachments here could decide if it  
17 needed to hear live evidence on this. It's an important  
18 enough issue where this man was --

19 THE COURT: Why isn't the complaint an important  
20 enough issue? This isn't the only issue in the case.  
21 That's all I'm saying is why are we hijacking the whole  
22 case over one issue?

23 MR. NATHAN: Certainly, the --

24 THE COURT: Again an issue that if it really --  
25 I mean it should have been discovered back in -- 15 years

1 ago. I mean I'm not saying that you can't prove it. I'm  
2 just saying that given the history of this case, I'm not  
3 sure this is the kind of thing that we drop everything to  
4 address given all the reasons why this could have been  
5 dealt with many years ago.

6 MR. DAVIS: Yes, Your Honor. I may be out of  
7 order and you'll let me know. But with your indulgence,  
8 I'd like to address the Court. And I understand if you'd  
9 rather not, but this is very important.

10 THE COURT: I think to have the City solicitor  
11 who's not seated at counsel table take an issue that  
12 counsel is already pursuing -- let me ask you, Mr. Amato,  
13 is it or Mr. Conroy?

14 MR. NATHAN: It's Shneur Nathan, Your Honor.

15 THE COURT: Okay. I'm sorry. You're not on my  
16 list. But in any event, do you represent the individual  
17 defendants or do you represent the City or both?

18 MR. NATHAN: I represent the individual  
19 defendants, Your Honor.

20 THE COURT: Well, I will let the City be heard  
21 on this issue. It's one counsel per matter. And I think  
22 Ms. Lynch has been representing the City up to this point.  
23 I only want to hear from any attorney who has entered an  
24 appearance in this case. Who is going to be heard from  
25 the City on this issue, anyone who has entered an

1 appearance in this case if the City wants to be heard?

2 MR. NATHAN: Your Honor, may I confer with  
3 Mr. Davis for a moment?

4 MR. DAVIS: Never mind. I don't want to hold  
5 things up, judge, and I respect the Court's ruling. Never  
6 mind.

7 THE COURT: So, Ms. Lynch, do you want to add  
8 anything on this point or --

9 MR. DAVIS: No, Kara. No, Kara.

10 MS. LYNCH: No, Your Honor.

11 MR. NATHAN: Your Honor, may I add one more  
12 thing?

13 THE COURT: Yes.

14 MR. NATHAN: Your Honor noted that why wasn't  
15 this brought up sooner back in 2015, I just wanted to --  
16 15 years ago and I wanted to correct just the factual  
17 point. This document that we allege was completely  
18 forged, we are saying it was forged when Mr. Parks brought  
19 it out much later. That's not 15 years ago. He is  
20 saying -- the question -- it is strange that he --

21 THE COURT: Wait. Say that again. When was it  
22 forged?

23 MR. NATHAN: It was forged at the time that he  
24 attached it to his petition for writ of innocence saying I  
25 suddenly found this document.

1 THE COURT: Right.

2 MR. NATHAN: And he says that he got it by  
3 issuing a Freedom of Information Act request to the  
4 circuit court and received it in a stack of documents  
5 sitting in his cell together with other police reports  
6 which he -- so he says I didn't notice it for some time.  
7 I think he says the particulars are about a year or so and  
8 I'm being a little bit loose on that fact. "Until oh, I  
9 notice, a-ha, I have a document that shows -- that ticks  
10 every box in my writ of petition for innocence that I need  
11 to file." And now we have two experts that are saying  
12 this document is a forgery. This is --

13 THE COURT: Again where were these experts when  
14 the man was being released?

15 MR. NATHAN: We were not a party to the case,  
16 Your Honor. We had no say in that. We did not hear it.  
17 We had no opportunity to look at it.

18 THE COURT: Officer Mueller was basically being  
19 accused of being part of some sort of misconduct, wasn't  
20 he?

21 MR. NATHAN: Officer Mueller was interviewed by  
22 someone from the State's Attorney's Office, some  
23 representative without counsel and all he said was -- they  
24 said is this your signature and he said, yeah, it is  
25 because it is. It's an --

1           THE COURT: Okay. I think I've basically ruled  
2 on this issue. Okay. I mean I've set a -- we haven't set  
3 a firm schedule. I've said that this issue can be dealt  
4 with before trial when it's ripe when the discovery has  
5 occurred. If you file a motion now, you are going to have  
6 to amend your brief at some point anyways to incorporate  
7 either new facts you gain in discovery or at least to  
8 address the facts that the plaintiff elicits on discovery.

9           So rather than getting into multiple rounds of  
10 briefing, the first preliminary round and then the post  
11 discovery round, I think it's wise to do this all in one  
12 fell swoop.

13           MR. NATHAN: I'm not rearguing it. I understand  
14 that, Your Honor. But the other proposal that I was  
15 saying is that we would file the motion and we could have  
16 an evidentiary hearing on it and there would be one issue  
17 for the Court to resolve.

18           And we strongly feel that that is the correct  
19 course because it's -- based on a forged document, if we  
20 are forced to defend this entire case with essentially  
21 millions of dollars of costs and fees involved, there's no  
22 reason to prejudice the City of Baltimore like that.

23           MS. HORN: Your Honor, may I?

24           THE COURT: Yes.

25           MS. HORN: I think what counsel, Mr. Nathan has

1 said just highlights that this is an issue of fact  
2 discovery and actually an issue of expert discovery  
3 because what he said is we are relying on two expert  
4 reports that indicate that this document is a fraud. And  
5 we've reviewed them and we'll save our differing views of  
6 what those expert reports say and the validity of them for  
7 another day.

8 But I think the concern that we have with going  
9 down the road that he's suggesting is that he has hijacked  
10 this case that was properly pled so that they can pursue  
11 their defense.

12 And what I anticipate happening in discovery is  
13 objections to discovery that we take fights over who goes  
14 first or what issues go first. And because this is going  
15 to require us to hire our own expert and we don't have  
16 access to this other evidence that he's talking about that  
17 purportedly shows that this document is a fraud, my strong  
18 recommendation would be that we conduct discovery the way  
19 discovery is normally conducted. They, of course, can do  
20 discovery on their defense as they would any other  
21 defense. We get through expert discovery where we have  
22 the opportunity with all of the documents, the live  
23 testimony, other reports by this officer to hire our  
24 expert to counter theirs and this Court can make a  
25 determination of whether it's just an issue of fact for

1 the jury, which the more he talks, the more it sounds like  
2 to us.

3 THE COURT: Okay. So I don't want to hear any  
4 more on this. I think I am where I was before, which is  
5 that you file a motion. The answer is going to be we  
6 don't have enough information to defend this and they're  
7 right and so it's premature. If you want to file it, you  
8 can. But the likely ruling will be it's premature and it  
9 will be denied without prejudice. And the amount of  
10 resources on both sides to deal with a premature motion in  
11 the courts is really not worth it if you ask me.

12 I would -- as I said, we'll proceed to  
13 discovery. This is an issue if after discovery on this  
14 issue, it can be fully briefed and argued and/or if we  
15 need an evidentiary hearing, we can do that in advance of  
16 trial. I'm not going to agree with Ms. Horn that this is  
17 something that has to go to trial to be resolved depending  
18 on what is found. You may have an expert who agrees or  
19 disagrees with their position. We just don't know at this  
20 point. I don't know at this point. And so this is  
21 something that will be part of discovery and it will be  
22 something that should be towards the front end of  
23 discovery. My point just being as I am sensitive of the  
24 idea of someone just hijacking this case.

25 So the parties have to agree on a schedule that

1 accommodates discovery on this issue and other issues and  
2 you can debate and discuss which issues are priorities to  
3 the plaintiff and this is obviously an issue of priority  
4 to the defense and that's where the first round will  
5 occur. And I would ask the parties to propose a schedule  
6 in terms of expert issues regarding this issue and  
7 anything else that can be laid out in the schedule.  
8 Obviously, if there are disputes which there may be, then  
9 the schedule can be adjudicated. But I'd ask the parties  
10 to try to meet and try to reach an accommodation in the  
11 first instance.

12 And then again once the materials are pulled  
13 together, whether your expert has been appropriately  
14 deposed and whether Ms. Horn finds an expert and you've  
15 had a chance to vet that expert and if there's any other  
16 fact evidence that needs to be had regarding this, once  
17 that's all compiled, then it would make sense at that  
18 point to file a motion for whatever result you think is  
19 appropriate at that point and we can address it then again  
20 short of in advance of trial.

21 So if you want to get these facts discovered  
22 quickly, then you can propose a quick schedule. But you  
23 will also have to be willing to work to give some  
24 discovery to the plaintiffs on their most important issues  
25 in the same timeframe and maybe that's ideal for everybody



1 because I think we always want to move these cases as  
2 quickly as possible.

3 So I think the way this usually works is I issue  
4 a scheduling order. I don't think I'm prepared at this  
5 point to negotiate and adjudicate discovery schedule  
6 issues. So I'll issue that with the standard  
7 instructions. But rather than having a conference which  
8 is what we usually do at this stage to iron out minor  
9 differences in the schedule because this schedule will  
10 require a little more tinkering and discussion and I would  
11 likely ask the parties to submit a joint status report in  
12 let's say 14 days out to either submit a proposed new  
13 schedule or if for some reason that can't be agreed to,  
14 then laying out what the issues are from a scheduling  
15 standpoint and then we can go from there. Anything else  
16 on that or other issues?

17 MS. HORN: Nothing from the plaintiff, Your  
18 Honor.

19 MR. NATHAN: Nothing from the individual  
20 defendants.

21 THE COURT: Okay. Thank you very much.

22 (Proceedings concluded.)  
23  
24  
25

CERTIFICATE OF REPORTER

I, Lisa K. Bankins, an Official Court Reporter for the United States District Court for the District of Maryland, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the motions hearing in the case of the Garreth Parks versus Baltimore City Police Department, et al., Civil Action Number TDC-18-03092, in said court on the 6th day of September, 2019.

I further certify that the foregoing 104 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 24th day of September, 2019.

Lisa K. Bankins

Lisa K. Bankins  
Official Court Reporter

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